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FEDERAL COMMUNICATIONS COMMISSION

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FCC 70-819

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
PART 21, SECTION 21.703 (g) AND (h) OF THE COMMISSION'S RULES

MEMORANDUM OPINION AND ORDER

(Adopted July 29, 1970; Released July 31, 1970)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has before it a petition captioned as above, filed on June 11, 1970, by Varian Associates, Solid State Division, Micro Link Products (Varian), seeking a declaratory ruling relating to Section 21.703(g) of the Rules, insofar as it applies to the band segment 2150–2160 MHz.

2. With respect to the frequency band 2110–2200 MHz, Section 21.703(g) presently states:

> The maximum bandwidth authorized in this service in the following frequency bands shall not exceed the limits set forth below:
> Frequency band (MHz)—2110–2200 . . . etc. . . .
> Authorized bandwidth (MHz)—3.5.

3. Petitioner contends that the Commission did not intend to specify any particular maximum authorized bandwidth for stations operating within the frequency band 2150–2160 MHz and traces the allocation history of the band in support of its contention. The overall band 2110–2200 MHz was first allocated in 1959 for common carrier use, on a shared basis with private systems, in the Fifth Report and Order in Docket No. 12404 (24FR1417). When rules implementing that allocation were adopted in a subsequent Order (24FR6052) that same year, those rules specified a 5 MHz bandwidth for the entire band 2110–2200 MHz.

4. In July 1962, the Commission initiated rule making in Docket No. 14712 looking toward separate allocations within the band 2110–2200 MHz for common carrier and private users and for the reservation of a portion of the band for the development of omni-directional, non-broadcast systems. It was intended that the band be divided into four 20–MHz segments and one of 10–MHz with the latter being made available for omni-directional use on a shared basis by both common carrier and private users. The discussions throughout the proceeding made it clear that references to "narrow-band" systems did not include the omni-directional systems. The Report and Order in this proceeding in December 1962 (27FR12372) allocated 2110–2130 MHz and 2160–2180 MHz exclusively to common carriers and 2130–2150 MHz and 2180–2200 MHz exclusively to non-common carriers, i.e., operational fixed and international control, and stipulated that a maximum of 800

kHz would be authorized in each of those four bands. In the case of the band 2150–2160 MHz, however, paragraph 8 of the Report and Order is particularly pertinent and is quoted herewith, in part:

> The recommendation submitted by EIA to provide a 5 Mc/s segment at each end of the 2110–2200 Mc/s band in order to permit development of duplex omnidirectional, non-broadcast systems in lieu of the 10 Mc/s segment as proposed, has considerable merit. However, the segment was envisioned for the development of broadband systems which could not be derived from the 952–960 Mc/s band because of narrow band limitation on that band . . .

5. The concluding paragraph of that Report and Order read, in part, as follows:

> . . . Part 2 of the Commission's Rules is amended as set forth in the attached Appendix effective January 15, 1963. Necessary amendments to Parts 6, 7, 9, 10, 11, 16 and 21 of the Rules will follow, with changes to each part as appropriate.

Those amendments to other Parts of the Rules were subsequently issued and we find those dealing with operational fixed stations unchanged as of today—except with respect to Rule Part numbers. Sections 89.121, 91.111 and 93.111 all show the following:

> Frequency band (MHz)—2130–2150, 2150–2160, 2180–2200.
> Maximum authorized bandwidth—800 kHz, 10 MHz, 800 kHz.

Part 21, on the other hand, did not break the band into segments but used the more general listing of 2110–2200 MHz and indicated 800 kHz as the maximum bandwidth to be authorized.

6. Later, on July 25, 1967, a petition was filed (RM–1188) seeking amendment of Section 21.703(g) so as to provide for a maximum authorized bandwidth of 3.5 MHz in lieu of the 800 kHz maximum then in force. Again, however, that petition was directed clearly at the frequency bands 2110–2130 and 2160–2180 MHz. Nonetheless, because of the earlier loose amendment of this Section, when the petition was granted it amended the overall band 2110–2200 MHz across the board, even though common carriers had no access to 40 MHz of that total spectrum space and only shared access to another 10 MHz of it.

7. Additionally, it should be noted that the Commission in responding affirmatively to the above petition modified Note 3 under Section 21.701 of its Rules to reflect a prohibition against television in the band segments 2110–2130 and 2160–2180 MHz and the imposition of a limit of 3.5 MHz with respect to maximum authorized bandwidth in those same band segments. At the same time, however, 2150–2160 MHz was not similarly limited.

8. In light of the above, Varian obviously is correct in its assertions and Part 21 should be amended accordingly. Further, in view of the fact that there are now no Commission licensees operating on a regular basis in the band 2150–2160 MHz and hence none whom could be affected adversely by a Commission action calling for a modification of the terms under which access thereto might be effected. Section 21.703 (g) is amended, with respect to the frequency band 2100–2200 MHz to reflect the following:

> Frequency band (MHz)—2110–2130, 2150–2160, 2160–2180.
> Maximum authorized bandwidth (MHz)—3.5, 10.0, 3.5.

9. Section 21.703(h), which now reads as follows, is retained, unchanged in its entirety:

(h) The bandwidths authorized on frequencies above 500 MHz shall be appropriate to the type of operation in any particular case. An application requesting such authorization shall fully describe the modulation, emission, and bandwidth desired and shall specify the bandwidth to be occupied.

10. In view of the considerations set forth above, compliance with the public notice requirements of 5 U.S.C. § 553 is unnecessary, and since the amendment relieves an existing restriction, the amendment may be made effective August 7, 1970.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

In § 21.703(g), the entry for the frequency band 2110–2200 MHz and bandwidth 3.5 MHz is deleted and the following 3 entries added in lieu thereof:

§ 21.703 BANDWIDTH AND EMISSIONS LIMITATIONS.

* * * * * * * * *

(g) * * *

Frequency Band (MHz)—2110–2130, 2150–2160, 2160–2180.
Authorized Bandwidth (MHz)—3.5, 10.0, 3.5.

* * * * * * * * *

FCC 74-748

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of AMERICAN BROADCASTING COS., INC. For Renewal of License for Station KGO-TV, San Francisco, Calif.	File No. BRCT-62

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 26, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (i) American Broadcasting Companies, Inc.'s license renewal application for Station KGO-TV, San Francisco, California; (ii) a Petition to Deny and to Intervene filed by the Community Coalition for Media Change and others; (iii) American Broadcasting Companies, Inc.'s Opposition; and (iv) the Community Coalition for Media Change's Reply.

2. American Broadcasting Companies, Inc. filed its application for renewal of license for Station KGO-TV, San Francisco, California, on August 31, 1971. On November 1, 1971, the Community Coalition timely filed its petition to deny the subject application, challenging the following aspects of Station KGO-TV's operation: the station's efforts to ascertain its service area's needs and interests, particularly those of the black, brown and Asian communities; the station's past and proposed programming; and KGO-TV's alleged discriminatory employment practices.

3. The Coalition is described as ". . . an unincorporated association representing over fifteen functioning local community organizations, whose affiliated national and local groups number over one hundred," and whose expressed purpose is the involvement of the minority population of the San Francisco-Oakland area in the electronic media. The petition's signatories, Marcus Garvey Wilcher, Ray Rivera, and Jimmy G. S. Ong, as well as most of the members of the organizations they represent, reside within the service area of KGO-TV. Thus, petitioners have standing to file a petition to deny the subject application. *Office of Communications of United Church of Christ* v. *FCC*, 359 F. 2d 994 (D.C. Cir. 1966), and KGO-TV does not challenge petitioners' standing.

ASCERTAINMENT

4. The Communications Act requires that as a prerequisite to the grant of an application for renewal of a broadcast license, the Commission must find that the station will be operated to serve the public interest during the upcoming license term. The Commission has stated that the principal ingredient of the licensee's obligation to operate in

the public interest is the diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of his community. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7294 (1960) (1960 *Programming Policy Statment*). In order to determine whether the licensee has met this obligation, the Commission designed Section IV–A (radio) and Section IV–B (television) of Part I of the renewal application to require the licensee to state the methods he used to ascertain his community's needs and interests (*i.e.*, problems), those problems which his station plans to meet during the coming license period, and typical and illustrative programs which he will present to meet those problems. In a *Report and Order* released February 23, 1971, the Commission adopted the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, wherein we sought to clarify our policies and provide guidelines for the fulfillment of our requirements with respect to the ascertainment process. The *Primer* prescribes the methods a licensee must employ to ascertain the needs and interests of his community. Briefly stated, he first must determine the composition of the community, indicating its economic, social, racial, ethnic, and other significant characteristics. Thereafter, he must consult with the leaders of the significant segments that comprise the community and with a random sample of the general public. The purpose of these consultations is to elicit from the interviewees what they believe to be the problems faced by the community. Having completed the surveys, the licensee must list all the problems ascertained and then evaluate them to determine which problems merit treatment by the station. Finally, the licensee must propose programming designed to meet those problems.

5. A review of KGO–TV's renewal application discloses that the licensee has described the demographic characteristics of its service area. Based on this data, KGO–TV management personnel, within six months of filing the application, interviewed 307 community leaders representing various groups within the community. Of the 307 persons interviewed, 8.8% were from the Spanish surnamed community, 16.9% were Black, and 8.5% were of Asiatic descent. KGO–TV also hired a professional research organization which conducted in person interviews of 1512 members of the general public selected at random in April and May 1971. Of those interviewed, 8% were Black, 5% were Oriental, and 9% classified themselves as Mexican or Spanish.

6. Additionally, in its application, KGO–TV described supplemental ascertainment techniques used during the license term. For example, KGO–TV submits that it regularly held community affairs meetings and luncheons attended by key station personnel and guests representing a variety of groups in the station's service area. Program suggestions and guest appearances often resulted from these meetings and luncheons. Station personnel, together with other broadcasters, met periodically with local leaders and organizations. Station executives consulted individually, with community leaders throughout the license period. KGO–TV periodically sends letters to leaders and experts in various sectors of community life requesting their opinions and comments on what they regard as urgent problems.

7. Petitioners allege generally that "The Station has failed to ascertain the needs of the public, particularly of the Black and Brown communities." However, their only specific allegations concern KGO–TV's supplemental ascertainment methods used during the license term. Petitioners maintain, for instance, that guests at the community affairs luncheons listed in the application did not include any representatives of certain minority organizations, that station executives did not maintain a continuing dialogue with individual community leaders throughout the license term, that the joint meetings with other broadcasters were with mostly white officials, that community leaders whose views were periodically solicited by mail did not include representatives of certain minority organizations, and that a list of organizations to which station employees belonged included few, if any, minority organizations. In its opposition, KGO–TV disputes petitioners' allegations concerning its supplemental ascertainment techniques in some detail. KGO–TV lists for instance, the names of Black, Spanish surnamed, and Oriental leaders who attended its community affairs meetings and luncheons and whose views were solicited by mail.

8. Contrary to petitioners' charges, KGO–TV's ascertainment efforts not only fully comply with the Commission's ascertainment *Primer*, but surpass those requirements. The surveys of community leaders and members of the general public are specifically responsive to and more than meet the requirements of the Commission's *Primer*. Also, as indicated KGO–TV has followed several supplemental ascertainment activities and has demonstrated that through these activities it has sought to establish a dialogue with a broad spectrum of people throughout its license term. Certainly, KGO–TV cannot be faulted for these ongoing efforts, particularly in the absence of facts which would indicate that a significant group or segment of the public has been omitted. By merely criticizing the techniques utilized, petitioners have failed to call into question the reasonableness or good faith of the licensee's ongoing ascertainment activities. Accordingly, we conclude that petitioners have failed to raise a substantial and material question of fact in this regard.

PAST PROGRAMMING

9. Petitioners allege generally, based on Exhibits 6, 9, and 10 of the renewal application, that KGO–TV's nonentertainment programming has failed to meet ascertained community needs, particularly minority needs. Petitioners also raise a promise vs. performance question, question the weekend scheduling of most of the locally produced public affairs programs, and charge that the station frequently preempted its minority oriented *On the Spot* program and throttled the views of petitioner Marcus Garvey Wilcher.

10. In its Opposition KGO–TV refers to the list in Exhibit 6 of the application of Public Affairs programs which it carried during the license period to serve community needs and cites specific examples of subjects which the programs covered. In addition to the ABC network program, *Issues and Answers*, which focuses on national and international issues, KGO–TV has broadcast four regularly scheduled locally produced public affairs programs: *A.M., Bay Area Focus, Hello World* and *On the Spot*. *On the Spot* is specifically minority oriented

while the other three feature topics and guests from all segments of the community including minority groups.

11. *A.M.* is a 6:30 A.M. to 8:30 A.M. telephone talk show with a moderator and community leader guests and is broadcast weekdays. Topics during the past license period have included busing, various subjects related to pollution and the environment, crime, prison reform, consumer problems, housing discrimination, minority summer jobs, Black History, problems of education of Chinese school children, food and the poor, welfare, neighborhood legal assistance, and various issues concerning the police. Further, Grace Thorpe, Indian activist, appeared to discuss the Indian occupation of Alcatraz, Marcus Garvey Wilcher appeared to discuss racism, Cruz Reynoso, Director of California Rural Legal Association, appeared to discuss the cut back in funds to aid Mexican American farm workers, and Isedro Gloria appeared to discuss problems of the Filipino community.

12. *Bay Area Focus* is a discussion program on local issues broadcast on Sundays from 2:30 to 3:00 P.M. Each week a group associated with a particular problem, issue or activity participates in the program providing guests and materials necessary to the discussion. At least one program a month deals with minorities. Subjects have included activities for minority youth, rehabilitation of exconvicts, police community relations, the role of the Black woman in United States history, poverty and hunger in the community, summer jobs for minority youth, heritage of Mexican Americans and pollution.

13. *Hello World* is a half hour discussion program broadcast at 7:00 P.M. Saturdays with a moderator and community leader guests. At times other prominent figures in this country and abroad are brought into the discussion via telephone. Guests have included Mayor Alioto and Governor Reagan. On a subsequent program state senator Anthony Beilenson appeared to disagree with Governor Reagan's views on welfare.

14. *On the Spot* has been broadcast since July 1970, replacing a program entitled *Black Dignity*, which was broadcast prior to that date. *On the Spot* is a half hour program broadcast at 2:00 P.M. on Sundays and uses a press conference format and focuses on issues of particular relevance to the area's minority groups. A panel of newsmen representing the minority press question prominent public figures whose actions affect the minority communities. Topics have included various educational issues relevant to minority children, such as busing and bi-lingual classes for Chinese and Spanish speaking students, housing, redevelopment activities and their effect on minorities, various subjects concerning the police such as police brutality, police recruiting, and problems of minority policemen, hunger and poverty in California, plans for assisting the poor in San Francisco and in Oakland, and pesticides and field workers. The application contains a representative list of newsmen who served as panel members, including Blacks, Chinese Americans, Japanese Americans, Mexican Americans, American Indians and others.

15. The application also contains an illustrative list of locally produced special Public Affairs programs broadcast during the year preceding the filing of the application. Topics included inflation, issues in a local primary election, the costs of owning a car, earthquakes, and

air and noise pollution. KGO–TV also broadcasts editorials and rebuttal statements, and a list of topics in the application and opposition includes jobs for minority youth, earthquake proofing school buildings, oil spills, prison conditions, unemployment, education, race relations, welfare, crime, drugs, transportation, pollution, the environment, and busing.

16. It is apparent from the description in the preceding paragraphs that KGO–TV has broadcast programs to meet community needs including ascertained needs listed in its 1968 renewal application and needs of the minority communities.[1] To challenge a station's programming, a petitioner must make specific allegations of fact which, if true, would establish that the licensee's overall programming could not reasonably have met the needs and interests of its community, including any minority group within the community. "In serving the needs of his community, the broadcaster is not required to meet all community problems; rather, a licensee may determine in good faith which problems merit treatment by the station." *Taft Broadcasting Company*, 38 FCC 2d 770, 790 (1973). Further while a licensee may not ignore a strongly expressed need, it is not required to separate its programming into programming for each group within the community in proportion to its numbers in the population. *Stone* v. *FCC*, 466 F. 2d 316, *reh. den.* 466 F. 2d 331 (D.C. Cir. 1972). As stated above, KGO–TV has broadcast a variety of programs to meet community needs, and petitioners have presented no information to indicate that KGO–TV has failed to make a reasonable and good faith determination of which problems merit treatment by KGO–TV or to present programming which is responsive to these problems.

17. Petitioners, as indicated, also raise a promise vs. performance question as to KGO–TV's Public Affairs programming. Although the amount broadcast in the composite week (11:09 hours; 8.09%) approximates the amount proposed in the 1968 renewal application (11:16 hours; 8.22%), petitioners charge that the composite week contained one hour of special public affairs programming and, thus, was not representative of a normal week of public affairs programming. The petitioners, of course, have the burden of demonstrating with specificity the facts which warrant grant of the relief requested. 47 U.S.C. 309(d)(1). Here, however, petitioners offer nothing but KGO–TV's composite week figures in support of this allegation. Their assumption that since these figures included one hour of special public affairs programming, they are unrepresentative, does nothing to establish the validity of their charge. Further, the facts contained in KGO–TV's renewal application and opposition pleading refute petitioners' charge. For instance, the licensee, pointing to the list in the applica-

[1] Needs ascertained in 1968 related to civil rights, housing, transportation, schools, jobs for minorities, crime, and substandard urban conditions. Petitioners charge that KGO–TV's regular and special public affairs programs and editorials failed to discuss discrimination in employment and housing, police mistreatment of minorities, and poverty. However, it is clear from the topics listed in paragraphs 10–15 and cited in the application and opposition that these subjects were in fact discussed. Petitioners make a related allegation that some of KGO–TV's Other programming (certain agricultural and instructional programs) was not related to ascertained needs and that its religious programming was not oriented to minority churches. However, while a licensee is required to ascertain community needs and to provide programming to meet at least some of them, there is no requirement that every one of a station's nonentertainment programs be related to some ascertained need listed in the station's previous renewal application.

tion of special public affairs programs broadcast between May 1970 and May 1971, states that public affairs specials average one hour per week and that, therefore, the composite week was representative of the station's past programming and that no promise vs. performance question exists. We conclude, therefore, that no substantial and material question of fact has been raised.

18. Petitioners also state that in 1968 KGO–TV proposed 5:32 hours of local programming (that is, locally produced, as distinguished from network or recorded programming) but aired only 3:35 hours of local programming during the composite week. Petitioners also state in this regard that since most of the public affairs programs designed to meet community problems are locally produced, this raises a question that the licensee failed to serve community needs to the extent it had promised. Here, however, it appears that petitioners have misread KGO–TV's applications. Apparently petitioners are referring to the amount of local programming broadcast from 6:00 P.M. to 11:00 P.M. The renewal applications show, however, that the total amount of local programming proposed in 1968 was 21:13 hours and the amount broadcast in the 1971 composite week was 23:40 hours. As is clear from the discussion of KGO–TV's public affairs programming above, it has broadcast approximately 11–½ hours of public affairs programming per week. It has also broadcast a locally produced half hour instructional program, *Channel for Learning*, at 6:00 A.M. on weekdays and approximately 1:45 hours a day of locally produced news programming on weekdays and 45 minutes on Saturdays and Sundays. It is plain, therefore, that KGO–TV has provided a substantial amount of locally produced programming designed to meet community problems, needs and interests. Further, as we have previously stated, while some problems may best be met by local programming, other problems may more appropriately be covered with non local program sources. *Renewal of Broadcast Licenses*, 44 FCC 2d 405, 422 (1973).

19. Petitioners also allege that the composite week logs show two instances of program misclassification, in violation of Sec. 73.670 of the Rules. Petitioners note that the program, *The His and Her of It*, has been classified as both entertainment and public affairs and that *Golf—The Short Course*, a program of golf instruction has been classified as instructional when it should have been classified as sports. In the Opposition KGO–TV explained that *The His and Her of It* was divided into different segments according to subject matter and that some were public affairs and others were entertainment. Of the 4–½ hours of the program broadcast during the composite week, about 1–½ hours were classified as public affairs. With reference to the golf program the licensee stated that it was broadcast as part of the *Channel for Learning* program series, which is usually clearly instructional in nature, with an emphasis on academic subjects such as art and history. The golf program had been classified as instructional because the program series was usually instructional.

20. Section 73.670 of the Commission's rules, 47 C.F.R. 73.670, leaves to a licensee's discretion program units which it wishes to count separately. Here, it appears that KGO–TV has pro-rated the subject matter of *The His and Her of It* program between entertainment and

other permissible classifications. This, as indicated, is in accordance with Section 73.670. Further, given the instructional nature of *Golf—The Short Course*, KGO–TV's classification of this program as instructional was entirely reasonable.[2]

21. Petitioners fault the scheduling of KGO–TV's Public Affairs and Other programming. They state that all but two locally produced programs, including public affairs, are broadcast on Saturdays and Sundays, the exceptions being *A.M.*, which as described above is aired at 6:30 to 8:30 A.M. on weekdays, and *Channel for Learning*, an instructional program, which is aired at 6:00 A.M. to 6:30 A.M. on weekdays. Petitioners further allege there is no public affairs program shown during prime time on weekdays, and only one public affairs program, *On the Spot*,[3] is shown during prime time on the weekend.

22. It is, of course, well established that licensees are accorded broad discretion not only in their choice of programs to meet community problems, needs and interests, but in the scheduling of those programs as well. See, e.g., *Time-Life Broadcast, Inc.*, 33 FCC 2d 1081, 1092 (1972). As KGO–TV's renewal application demonstrates, the station has broadcast a broad spectrum of News, Public Affairs, and All other programs, exclusive of Entertainment and Sports designed to serve community problems, needs and interests. Further, as disclosed by Exhibits 9 and 10 of KGO–TV's application this programming has been presented at various times during the broadcast day, including the morning hours (e.g., A.M. and *Channel for Learning*), the afternoon hours (e.g., *On The Spot* and *Bay Area Focus, Issues and Answers*), and prime time (e.g., *Hello World*, and numerous special programs). Weekdays KGO–TV broadcast two five minute local news segments in the morning, an hour long locally produced news program in the early evening, and a half hour local news program in the late evening in addition to a half hour of network news in the early evening. On Saturdays and Sundays it broadcast a total of 45 minutes of local news each day in the early and late evening and 15 minutes of network news. KGO–TV also broadcast approximately 14 editorials each week on various days and at various times of the day. The fact that some of this programming is broadcast on weekends does not constitute an abuse of the licensee's program scheduling discretion.

23. Finally, petitioners allege that due to frequent preemption of the only locally produced minority public affairs program (i.e. *On The Spot*), the station has breached its duty to serve the needs and interests of the minority community. In an affidavit of Walter Thompson, Black former moderator of *On The Spot*, it is alleged that "When-

[2] Even if petitioners' charges were accepted as true, we do not believe a substantial and material question of fact is presented. Classification of programs reflects the good faith judgment of the person preparing the log at that time. Minor errors in program logs do not constitute cause for an evidentiary hearing. See, e.g., *Time-Life Broadcast, Inc.*, 33 FCC 2d 1050, 1057 (1972), *Scripps-Howard Broadcasting Company*, 31 FCC 2d 1090, 1105 (1971). Petitioners have offered no evidence (i.e., specific facts) which would indicate that the alleged errors involve anything other than human failings to comply with the technical and often confusing logging requirements; there is no evidence of intent to deceive the Commission or to establish a pattern of misclassification which would call into question the licensee's overall service to its community. Compare, *Chicago Federation of Labor and Industrial Union Council*, FCC 74–529, 30 RR 2d 509 (1974).

[3] Although *On the Spot* was previously broadcast at 2:00 P.M. on Sundays, it was rescheduled at 7:00 P.M. on Saturdays in the fall of 1971.

ever programs were to be preempted, the station generally chose public affairs," and *On The Spot* was preempted eleven times between November, 1970 and August, 1971, more often than any other single program.[4] Mr. Thompson further alleges that *On The Spot* was used as a vehicle for "dumping" "non-establishment" candidates during election periods following appearances of "popular" candidates on programs "which commanded large viewing audiences." Petitioners submit that this amounted to the censorship of minority views since *On The Spot* is the only minority program telecast by KGO. Finally, petitioners question whether KGO has established a pattern of preempting the only specifically minority oriented public affairs program, *On The Spot*, due to its failure to promote upcoming shows and failure to reschedule the preempted programs.

24. In the opposition KGO–TV denies the allegation that KGO has established a pattern of preempting *On The Spot* and other public affairs programs. It states that only 13 *On The Spot* programs were preempted from its premier in July, 1970 to December 1, 1971, and 61 were broadcast during that period. Additionally, KGO states that even though one *On The Spot* program on which Marcus Wilcher was to appear, had been preempted, the licensee was not trying to keep Mr. Wilcher or his ideas off the station, pointing out that Mr. Wilcher appeared five times on KGO to discuss racism (three different times on *A.M.*, once on *On The Spot*, and once on *Bay Scene*). Contrary to the statement of Mr. Walter Thompson in his affidavit that public affairs programs were generally preempted over other programs, KGO–TV maintains that the preponderance of programming preempted was entertainment, not public affairs. It states that an analysis of its programming during the year preceding the filing of the renewal application shows:

> —During the fourth quarter of 1970, 17 regularly scheduled programs were preempted: 15 hours of entertainment programming were preempted but only two hours of public affairs programming.
>
> —During the first quarter of 1971, 35 programs were broadcast that necessitated preempting regularly scheduled program; 11¼ hours of preempting programs were public affairs while four hours of the preempted programming were of public affairs nature and 33 hours were entertainment.
>
> —During the second quarter of 1971, 42 programs were broadcast which preempted regularly scheduled programming; 10¾ hours of the preempted programming was of a public affairs nature and 37½ hours were entertainment. During this quarter one *On The Spot* program was preempted but was rescheduled and broadcast one hour later the same day.
>
> —During the third quarter of 1971, 51 programs were broadcast 17 of which were public affairs which preempted regularly scheduled programs; four hours of the preempted programming was of public affairs and 49 hours were entertainment. One *On The*

[4] Petitioners also question whether three special programs broadcast on Saturday evenings at 7:00 P.M. on Feb. 6, 1971, May 29, 1971, and June 12, 1971 did not also preempt *On The Spot*. However, as KGO–TV points out, the application clearly states that at the time of those broadcasts *On The Spot* was being carried on Sunday afternoons.

Spot program was preempted but was broadcast one hour later the same day.

25. Although the petitioners state in their Reply that a higher percentage of public affairs than entertainment programming was preempted, the licensee has stated that in three of the four quarters analyzed, more special public affairs programming preempting regular programming was broadcast than public affairs programming was preempted. Also, the licensee asserts that the appearance of "lesser known" political candidates on *On The Spot* was not due to fairness or equal time obligations imposed by the appearances of candidates on other programs, but rather was due to the fact that Mr. Thompson had scheduled some candidates for *On The Spot* and accordingly equal time regulations mandated the appearance of the "lesser known" candidates also on *On The Spot*.[5] Finally, KGO–TV stated that the promotional practices of KGO–TV with respect to which programs were promoted on the air and the degree of such promotion are not in any way connected with any pattern of preemptibility, and it stated that press releases on *On The Spot* were sent almost every week to all newspapers to which press releases for all KGO–TV programs are sent.

26. KGO–TV's preemption of its public affairs programs has not called into question the adequacy of its programming to serve community needs. There is no promise vs. performance question here. As noted above, the amount of Public Affairs broadcast in the composite week approximated KGO–TV's 1968 proposals, and the licensee's analysis of its programming indicates that more of the preempting programs than the preempted programs were public affairs. Thus the preemptions, over a period of time, resulted in a greater, not a lesser, amount of public affairs broadcasts. Further, we do not expect programming to remain static or to be presented according to a rigid schedule. See *The Evening News Association*, 35 FCC 2d 366, 391 (1972), and *Mahoning Valley Broadcasting Corporation*, 39 FCC 2d 52, 61 (1972). The scheduling of special programs, including special public affairs programs, is part of meeting community needs in a timely fashion. Certainly we will not fault a station for preempting public affairs or other programming on an occasional basis, even for sports or entertainment programming, if we are able to conclude, as we do here, that the station's past programming has on the whole served the needs and interests of its service area. *The Evening News Association*, 35 FCC 2d 366, 392 (1972). Finally, petitioners have not shown that the licensee has failed to meet minority needs through selective preemption of its minority oriented *On The Spot* program. Apart from the fact that KGO–TV's other public affairs programs often covered topics of particular interest to minorities, most of the *On The Spot* programs were broadcast at the time scheduled, and some which were preempted were rescheduled and broadcast at a later hour the same day. KGO–TV has adequately refuted the other allegations of discriminatory treatment of *On The Spot* relating to the

[5] Mr. Thompson stated that even the appearance of "lesser known" candidates was delayed until the November 1970 elections had passed. However, the licensee argues that while the *On The Spot* program in question scheduled for broadcast on November 29, 1970 was indeed delayed, the fact remains that the election took place on November 3, 1970 some four weeks before the originally scheduled date of November 29, 1970.

appearances of lesser known political candidates and KGO–TV's promotional practices. Accordingly no substantial and material question of fact has been raised here.

PROPOSED PROGRAMMING

27. Petitioners allege generally that KGO–TV's proposed programming will not meet ascertained community needs and interests, particularly minority needs. They also make a number of allegations directed at specific programs, and criticize the scheduling of the public affairs programs and a reduction in proposed public affairs programs and in local programming.

28. A review of the application and pleadings shows that KGO–TV's overall program proposals will reasonably meet the problems, needs and interests of its service area. As described above, KGO–TV has complied with the Commission's ascertainment requirements. It has listed the problems ascertained and has proposed programming designed to deal with a number of them. It proposes to continue its present public affairs programs *Bay Area Focus* (since renamed *Bay Scene*), *Hello World* (since renamed *Call Out*), *A.M., On The Spot* (which has been shifted from a Sunday afternoon to a Saturday evening time slot), and the network program *Issues and Answers*. In addition, in the fall of 1971, it added a new weekly program, *La Raza*, directed to the Spanish surnamed audience and produced in conjunction with representatives of Spanish surnamed groups. It is clear from our discussion above of the continuing programs and from the nature of the new *La Raza* program that they are designed to serve community problems, including problems of the minority groups within KGO–TV's service area.

29. Petitioners criticize a reduction in proposed Public Affairs programming [6] as compared with its 1968 proposal. In its Opposition KGO–TV points to increases in its News and Other proposals as compared with its 1968 proposals and states that it now proposes that an hour of its public affairs programming will be broadcast in the evening hours, whereas it had previously proposed scheduling its public affairs programs at various daytime hours. KGO–TV has proposed a substantial minimum amount of public affairs programming which will serve a variety of local needs and interests in conjunction with its increased news proposal. Further, as we have previously stated, "The Commission has not adopted quantitative standards by which to judge a licensee's performance in the context of a regular renewal. Instead, the amount of such programming has been left to the sound discretion of the licensee based upon his ascer-

[6] KGO–TV's 1968 and 1971 renewal applications show the following:

	1968 proposed		1971 past		1971 proposed	
	Hours	Percent	Hours	Percent	Hours	Percent
News	9:20	6.81	10:09	7.29	15:35	11.5
Public affairs	11:16	8.22	11:09	8.09	8:13	6.1
Other	3:28	2.53	7:48	5.66	5:29	4.0

tainment of community problems, the format of his station, the size of his market, the availability of other broadcast outlets in the market and other factors which may affect the licensee's operation of his station. Absent evidence that the licensee's percentage proposals will not meet ascertained community problems or that the licensee has abused its discretion, the Commission will not seek to second guess the licensee." *Mahoning Valley Broadcasting Corporation*, 39 FCC 2d 52, 61 (1972). No such evidence has been presented here, and accordingly, no issue has been raised.

30. Petitioners make a number of specific allegations concerning the relation of the proposed nonentertainment programming to community needs. They allege, for instance, that only a small percentage of the guests on *A.M.* have been minority persons and that only a small percentage of the programs have dealt with a specifically minority perspective and that there is no indication that these percentages will rise; that *La Raza* is the only new program devoted primarily to minority needs and will be broadcast on Sunday afternoons, "a notoriously low audience period", that no programs will be devoted exclusively or primarily to the needs of the Asian community; and that the proposed instructional programming and special programs do not relate to the needs of minority children and adults. While a licensee must evaluate community problems and propose programming to deal with at least some of them, as we stated above in our discussion of KGO–TV's past programming, there is no requirement that every nonentertainment program meet specific minority needs (or any previously ascertained community needs) or that there must be separate programming for each significant minority group. As described above, KGO–TV has proposed a variety of programming to meet community needs, including needs of minority communities, and accordingly, no issue has been raised here.

EMPLOYMENT

31. Petitioners maintain that KGO–TV has failed to comply with the Commission's equal employment opportunity requirements as set forth in Section 73.680 of the Rules, asserting that KGO–TV employs a non proportionate number of minority persons in relation to their percentages in the area's population and that those minority persons who are employed occupy the lower paying positions. Additionally, petitioners allege that KGO discriminates against those minority persons currently employed; relying on affidavits of Walter Thompson, former host of *On The Spot*, and his wife, Roberta Thompson, who assisted in producing the program. Their complaints involve the station's refusal to give Mrs. Thompson credit as the show's producer and to pay her accordingly; delays in delivering personal mail and at least two paychecks to Mr. Thompson; the station's alleged failure to enter into a contract with Mr. Thompson and to accord him deserved benefits; his dismissal as host of *On The Spot;* and the station's insistence on pre-taping Mr. Thompson's last two shows.

32. Concerning the complaint of the Thompsons, who allege that his dismissal as host of *On The Spot* was the culmination of

racially inspired harassment, the licensee first notes that Mr. Thompson's replacement is Roy Wills, also a Black. KGO–TV states that there was clearly one occasion when Mr. Thompson's paycheck was lost in its mail room for approximately three weeks, but the licensee claims that inadvertence was the cause of the delay. The station further represents that Mr. Thompson received all the benefits to which he was entitled under the AFTRA collective bargaining agreement as a "freelance," or parttime employee; that he received payment following the taping of each show; and that the admitted change of several taping dates was necessary to accommodate the schedules of the program's guests. Finally, the petitioner's complaint that KGO–TV insisted on pre-taping Mr. Thompson's final two *On the Spot* programs so that it could "censor" him prompted the station to respond that, after Mr. Thompson had made inaccurate and "embarrassing" remarks on a live broadcast, the station invoked the pre-taping procedure to avoid a recurrence. KGO–TV stated that the program was not intended to be a forum for the airing of Mr. Thompson's personal grievances against the station, and that at the time Mr. Thompson agreed to tape his last two programs and made no further comments regarding his replacement. The petitioners' Reply on this matter is limited to a reiteration of their contention that KGO–TV had censored criticism of the station. In light of KGO–TV's explanation, taking into account the licensee's ultimate responsibility for the content of all material broadcast and the fact that Mr. Thompson's replacement is Black, we find that the petitioners have not raised a substantial and material question of fact as to violation of our Rules by discrimination against an employee on the basis of race.

33. Exhibit 22 to the subject application describes the licensee's equal employment opportunity policies and programs which include several steps to assure nondiscrimination in recruiting, hiring, placement and promotion, and compensation. In addition to such measures as notices posted at the station and programs to advise potential employees of the station's equal employment opportunity programs, KGO–TV maintains contact with minority organizations with an eye to employment referrals. Also, KGO–TV's General Manager is responsible for filing monthly reports concerning station job openings and the steps that were taken to insure that equal employment opportunity policies were fulfilled in filling the positions. Additionally, the General Manager's report includes descriptions and explanations of how placement and promotion actions regarding existing employees are consistent with the licensee's equal employment opportunity policies. Also the General Manager must file a yearly report with the licensee's parent company that compares minority employees with other employees in terms of compensation, fringe benefits and other emoluments and should disparities exist, the report must explain how these "disparities are compatible with the Company's equal employment opportunity policy or the steps which have been taken to eliminate such disparities."

34. The Commission has consistently maintained that non-proportionate minority group employment at a station, standing alone, does not necessarily present an issue warranting exploration in an evidentiary hearing. See, e.g., *The Evening News Association*, 35 FCC 2d 366

(1972). The courts have also recognized that non-proportionate minority group employment at a station does not necessarily evidence discrimination requiring an evidentiary hearing. See, e.g., *Stone* v. *Federal Communications Commission*, 466 F. 2d 316, *rehearing denied*, 466 F. 2d 331 (1972); *Avco Broadcasting Corporation*, 39 FCC 2d 4 (1972), *affirmed sub nom., The Bilingual Bicultural Coalition of Mass Media, Inc.* v. *Federal Communications Commission*, 492 F. 2d 656 (D.C. Cir., 1974); and *The Bilingual Bicultural Coalition of Mass Media, Inc.* v. *Federal Communications Commission*, 492 F. 2d 669 (D.C. Cir. 1974). We realize, as complainant apparently argues, that statistics can raise appropriate questions requiring administrative action and, accordingly, the Commission has proceeded on this basis in a number of cases. See, e.g., *Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida*, FCC 74–18. Here, however, there is no need for further administrative inquiry.

35. According to 1970 U.S. Census Data, San Francisco, California has a population of 715,674 persons, of which 42.8% are minorities (i.e., Blacks, Indians, Spanish-surnamed Americans, Japanese, Chinese, Filipinos, and others). The population of the San Francisco-Oakland Standard Metropolitan Statistical Area (SMSA) is 3,109,519 persons, of which 28% are minorities. The record shows that the minority employment profile at the KGO–TV station ranged from 15.2% in 1971 to 26.5% in 1973, and included minorities in higher paying jobs each year. Thus, in 1971 KGO–TV employed 197 persons full time, including two Black, two Spanish-surnamed American and one Oriental professionals, five Black, two Oriental and two Spanish-surnamed American technicians, one Black sales worker, and two Black, five Oriental and three Spanish surnamed American office and clerical persons. In 1972, KGO–TV employed 224 persons fulltime, including three Spanish-surnamed American and three Oriental officials and managers, ten Black, six Spanish-surnamed American and two Oriental professionals, five Black, three Spanish-surnamed American, two Oriental, and one American Indian technician, one Black sales worker, and three Black, seven Oriental and two Spanish-surnamed American office and clerical workers. In 1973, KGO–TV employed 237 persons fulltime, including one Black, one Oriental and two Spanish-surnamed American officials and managers, eleven Black, seven Oriental, and seven Spanish-surnamed American professionals, seven Black, two Oriental, two American Indian and three Spanish-surnamed American technicians, one Black sales worker and thirteen Oriental, two Black and one Spanish-surnamed American office and clerical persons. It is clear that the licensee has undertaken affirmative action to improve the employment status of minorities, and minority employees have increased both in absolute numbers and as a percentage of the total fulltime workforce between 1971 and 1973. The minority employment at KGO–TV falls within a zone of reasonableness and when considered in conjunction with the licensee's equal employment opportunity policies, we conclude that further administrative inquiry is unwarranted. See *Avco Broadcasting Corp.*, 39 FCC 2d 4 (1972), *aff'd sub nom., The Bilingual Bicultural Coalition of Mass Media* v. *FCC*, 492 F. 2d 656 (D.C. Cir. 1974).

36. In conclusion, on the basis of our review of the licensee's renewal application and the matters discussed herein, we find that petitioners have failed to raise a substantial and material question of fact which establishes a *prima facie* case for denial of ABC's application for renewal of license. We also conclude that a grant of the application would serve the public interest, convenience and necessity.

37. Accordingly, IT IS ORDERED, That Community Coalition for Media Change's November 1, 1971 Petition to Deny IS DENIED.

38. IT IS FURTHER ORDERED, That the above-captioned application for renewal of license for Station KGO–TV, San Francisco, California IS HEREBY GRANTED, CONDITIONED ON:

(1) the outcome of *U.S.* v. *American Broadcasting Companies, Inc.*, Civil No. 72–821–LTL (C.D. Cal., filed April 14, 1972), and

(2) the licensee's immediately notifying the Commission of the final disposition of that case.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

109 004—74—2

FCC 74-803

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 95.37(c) CONCERNING THE ANTENNA HEIGHT RESTRICTIONS ON CLASS C OR D STATIONS IN THE CITIZENS RADIO SERVICE	Docket No. 19798 RM-800, RM-953, RM-1688, RM-1714, RM-2126, RM-2147

REPORT AND ORDER

(Adopted July 23, 1974; Released July 31, 1974)

BY THE COMMISSION:

1. The Commission has under consideration the Notice of Proposed Rule Making issued in the above captioned matter. This Notice, which was published in the Federal Register on August 15, 1973, 38 FR 22046, requested that interested parties file comments and reply comments by October 15, 1973, and October 26, 1973, respectively.

2. In our Notice we proposed to permit the use of antennas and supporting structures as high as sixty feet by Class C and D Citizens Radio Service stations. We also proposed to limit the use of high gain directional antennas.

3. Numerous comments were received by the Commission in this matter. While we will not summarize any of these comments in this document, they have all been read and considered by the Commission. The vast majority of the comments supported our proposed rule on permissible antenna heights. As to the proposal to limit antenna gain and the use of directional antennas, there was strong opposition.

4. We have decided to adopt as proposed the rule on antenna heights. While we are aware that several of the petitions for rule making requested higher heights and that some of the comments also make such a request, we believe that the sixty foot maximum will adequately meet the intended purpose, i.e. the establishment and maintenance of relatively short range radiocommunications.

5. In our Notice of Proposed Rule Making, we noted the increased height limitations may tend to decrease television interference problems, since it would allow for greater distances between Class D station antennas and a nearby television receiving antenna. Comments were received taking exception to this generalization, claiming the actual distance between two antennas resulting from the 40-foot increase would be too small to effect any significant reduction in interfering signal levels. There are many factors including the height of each of the antennas, their separation, etc., which influences each particular installation, making it impossible to arrive at a general conclusion as to whether interference may or may not, be reduced. However, we agree it would probably not be significant in either case.

6. The Commission, however, continues to maintain concern that the slope pattern in this rule will prove to be difficult for licensees to understand and apply properly. The only viable alternate to a slope pattern is to prohibit antennas that are more than 20 feet high within several miles of an airport. This, we believe, would tend to work an unnecessary hardship on a great number of licensees. We do, however, urge persons manufacturing and selling Class D antennas and supporting structures to assist licensees in properly locating and installing antenna structures so that serious problems with excessively high antennas near airports will not develop.

7. As to the proposal on antenna gain and directional antennas, we are not persuaded by the comments that directive antennas are needed above 20 feet. Although there were comments which suggested that directional antennas may be of benefit under certain limited circumstances, these benefits are considered to be greatly outweighed by the capability of such antennas to increase the potential for interference. Our decision is based in part on a computer study conducted by the Department of Commerce's Office of Telecommunications which evaluated the effects of omnidirectional and directional antennas at Class D stations for heights ranging up to 60 feet above ground.[1] The study indicates that a directive antenna of simple design at a height of 60 feet can achieve an effective radiated power (ERP) gain of approximately 6 dB over a monopole antenna at the 60-foot height. This 6 dB increase in ERP with the directional antenna would significantly increase the possibility of skip interference. Therefore, the Commission finds that omnidirectional antennas at heights of 60 feet above ground will provide sufficient local area coverage for Class D stations. The Commission believes that directional antennas at 60 feet above ground would unjustifiably increase the possibility of interference to both domestic and international operations. Therefore, the Commission is adopting rules to allow omnidirectional antennas up to 60 feet above ground while maintaining the present 20-foot restriction on directional antennas.

8. Authority for the rule changes adopted herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

9. Accordingly, it is ORDERED, effective September 6, 1974 that Part 95 of the Commission's Rules is amended as set forth in the Appendix.

10. It is further ORDERED, that RM–800, 953, 1688, 1714, 2126, and 2147 are denied to the extent that they are inconsistent with the rules adopted in this Report and Order and that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] Leslie A. Berry, "Citizens Band Class D Antenna Height Considerations," Office of Telecommunications Technical Memorandum OTM74–169.

APPENDIX

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 95.3 is amended to add the following definition in alphabetical sequence:

§ 95.3 DEFINITIONS.

* * * * * * *

Omnidirectional antenna—An antenna designed so the maximum radiation in any horizontal direction is within 3 dB of the minimum radiation in any horizontal direction.

* * * * * * *

2. Section 95.37(c) is amended to read as follows:

Section 95.37 *Limitations on antenna structures.*

* * * * * * *

(c) A Class C or Class D station operated at a fixed location shall employ a transmitting antenna which complies with at least one of the following:

(1) The antenna and its supporting structure does not exceed 20 feet in height above ground level; or

(2) The antenna and its supporting structure does not exceed by more than 20 feet the height of any natural formation, tree or man-made structure on which it is mounted; or

NOTE: A man-made structure is any construction other than a tower, mast, or pole.

(3) The antenna is mounted on the transmitting antenna structure of another authorized radio station and does not exceed the height of the antenna supporting structure of the other station; or

(4) The antenna is mounted on and does not exceed the height of the antenna structure otherwise used solely for receiving purposes, which structure itself complies with subparagraph (1) or (2) of this paragraph.

(5) The antenna is omnidirectional and the highest point of the antenna or its supporting structure does not exceed 60 feet above ground level and the highest point also does not exceed one foot in height above the established airport elevation for each 100 feet or horizontal distance from the nearest point of the nearest airport runway.

NOTE: A work sheet will be made available upon request to assist in determining the maximum permissible height of an antenna structure.

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FCC 74-793

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ARMSTRONG UTILITIES, INC., CRANBERRY TOWNSHIP, PA.	CAC-923 PA998
ARMSTRONG UTILITIES, INC., JACKSON TOWNSHIP, PA.	CAC-924 PA999
ARMSTRONG UTILITIES, INC., BOROUGH OF EVANS CITY, PA.	CAC-925 PA925
ARMSTRONG UTILITIES, INC., BOROUGH OF HARMONY, PA.	CAC-926 PA02A
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted July 17, 1974; Released July 25, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. On July 27, 1972, Armstrong Utilities, Inc., filed applications to commence cable television service at the Boroughs of Harmony and Evans City, and the Townships of Cranberry and Jackson, Pennsylvania.[1] These communities are located within the Pittsburgh, Pennsylvania major television market (#10). Armstrong proposes to carry the following television broadcast signals:

KDKA-TV (CBS, Channel 2) Pittsburgh, Pennsylvania
WTAE-TV (ABC, Channel 4) Pittsburgh, Pennsylvania
WIIC-TV (NBC, Channel 11) Pittsburgh, Pennsylvania
WQED (Educ., Channel 13) Pittsburgh, Pennsylvania
WFMJ-TV (NBC, Channel 21) Youngstown, Ohio
WKBN-TV (CBS, Channel 27) Youngstown, Ohio
WYTV (ABC, Channel 33) Youngstown, Ohio
WJAC-TV (NBC, Channel 6) Johnstown, Pennsylvania
WSTV-TV (CBS, Channel 9) Steubenville, Ohio
WTRF-TV (NBC, Channel 7) Wheeling, West Virginia

The carriage of these signals is consistent with Section 76.65 of the Commission's Rules and the applications are unopposed.

2. Armstrong requests a partial waiver of Section 76.251 of the Rules to allow the four towns to share one set of access channels and studio production facilities. In support of this request, the applicant notes the small size of the communities, the financial burden involved in providing separate access channels for each system, the community

[1] The populations of the communities are as follows:
Borough of Harmony, 1,450.
Borough of Evans City, 2,144.
Cranberry Township, 8,032.
Jackson Township, 2,444.

of interest between the communities and the fact that no place in any of the communities is more than 15 minutes away from the proposed studio. In addition, the applicant furnishes letters from the Southwest Butler County School District, which has jurisdiction over the communities, indicating an anticipated need of only six hours per week for the educational access channel, and from the governmental bodies of three of the four communities indicating a minimal anticipated need for the government access channel.[2]

3. We acknowledged in paragraph 148 of the *Cable Television Report and Order*, 36 FCC 2d 143, 197 (1972), that there would be situations in which our access requirements would impose an "undue burden" and a waiver would be appropriate. We are satisfied that considering the size of, and the distance between, the communities and the showing made, a partial waiver of the provisions of Section 76.251 of the Rules to allow Armstrong to share access channels and studio facilities is justified and within the scope of prior Commission precedents. See *Century Cable Communications, Inc.*, 44 FCC 2d 1023 (1974).

4. The franchise for the Borough of Evans City, awarded January 2, 1968, and the franchise for the Borough of Harmony, awarded September 7, 1971, do not contain provisions establishing that there were public proceedings prior to the franchise award or specifying the maintenance of a local office. However, the applicant states that its qualifications were considered in a public meeting and a local office for complaints will be maintained. Moreover, the franchise for the Borough of Harmony specifies the initial rates to be charged, and both franchises contain provisions requiring franchising authority approval of rate increases, and the completion of construction within 12 months. Both contain statements that the system shall operate in accordance with "all laws, ordinances or other regulations of governmental bodies . . ." The franchise fee for the Borough of Harmony is $100 and the Borough of Evans City does not require the payment of any franchise fee. Since the franchises were granted prior to March 31, 1972, only substantial consistency with the franchise provisions of Section 76.31 of the Rules need be demonstrated at this time, according to the note to Section 76.13(a)(4). We find the deviations described above to be relatively minor, and therefore find substantial consistency sufficient to grant the applications for the Borough of Evans City and the Borough of Harmony until March 31, 1977. *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73-293, 40 FCC 2d 493 (1973).

5. Armstrong contends that the townships of Cranberry and Jackson are "second class townships" under Pennsylvania law and, as such, do not possess the authority to grant franchises for the construction and operation of cable television systems. In support of this contention, the staff has received confirmation from Mr. Kenneth Kauffman, Assistant Attorney General, Commonwealth of Pennsylvania, that

[2] These letters indicate the following anticipated needs for the government access channel:
Cranberry Township—a few hours per week.
Borough of Harmony—3 hours per month.
Borough of Evans City—2 hours per week.
The fourth community, Jackson Township, has a population of only 2444, and is unlikely to have a greater access channel requirement.

both communities are "second class townships." In addition, the Commission has received a letter from Edward I. Steckel, Deputy Attorney General for the Commonwealth of Pennsylvania, indicating that "second class townships" are not empowered to grant cable television franchise. In para. 116, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 336 (1972), we indicated that we would consider on a case-by-case basis claims that there is no franchise or other appropriate authorization available for the cable operator to submit in an application for certificate of compliance. In such cases, the applicant is expected to make an acceptable alternative proposal assuring compliance with the substance of our rules, specifically Section 76.31.

6. In the absence of a franchise, Armstrong has made the following representations to the Commission: (a) Armstrong has operated one or more cable systems within Pennsylvania since 1964; (b) the rates charged initially in both townships will be $15 for connection and $5 per month for services. And in no event will the rates charged "exceed the rates charged in communities on the same headend for which applicant holds a franchise"; (c) Armstrong maintains a local business office in the Borough of Evans City, Pennsylvania, which is approximately 10 miles from both townships; (d) qualified employees will be on call at all times to resolve subscriber complaints; (e) Armstrong pledges that it will comply with all regulations of the Commission which are now in effect or which may be enacted at any time hereafter.

7. We find that Armstrong has submitted an acceptable alternative proposal which assures compliance with the substance of Section 76.31 of the Rules. Therefore, certificates of compliance will be issued, valid until March 31, 1977, subject to the same conditions which we have imposed in other similar cases:[3] These grants are made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems that may be brought to the Commission's attention involving cable operations in the subject communities.

In view of the foregoing, the Commission finds that a partial waiver of the provisions of Section 76.251 of the Rules and a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned applications for certificates of compliance (CAC–923, 924, 925, and 926) filed by Armstrong Utilities, Inc., ARE GRANTED, and the appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

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[3] E.g., *Mahoning Valley Cablevision, Inc.*, 40 FCC 2d 439 (1973). *Kanawha Cable Television Co.*, FCC 74–223, 45 FCC 2d 874 (1974).

FCC 74-787

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 REGARDING THE AUTOMATIC CONTROL OF REPEATER STATIONS IN THE AMATEUR RADIO SERVICE	Docket No. 20112

NOTICE OF PROPOSED RULEMAKING

(Adopted July 17, 1974; Released July 25, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. Notice of Proposed Rule Making is hereby given in the above entitled matter.

2. The Commission is considering amendments to the rules for the Amateur Radio Service to provide for automatic control of repeater stations. Every amateur radio station, including all repeater stations, has always been required to have a control operator at an authorized control point when in operation. In the Report and Order, in Docket 18803, 37 FCC 2d 225 (1972), we predicted advancements in amateur remote control and automatic control would necessitate further rule making in the matter of repeater control. Interested parties having information and suggestions in these areas were urged to submit them to us for consideration. We are appreciative for the helpful response from those amateurs and organizations doing so. In particular, we are grateful to several amateur licensees for their experiments in semi-automatic and automatic repeater control, and to the American Radio Relay League for their suggestions. This information, together with our awareness of the vast improvement in the amateur remote control methods in recent months, leads us to believe there is an appropriate basis for moving forward in this area.

3. By the term *control*, as used herein, we mean the techniques for accomplishing the prerequisite responsibility for the proper operation of an amateur radio station in compliance with the rules. A control operator, whether or not the station licensee, at a control point located adjacent to the station transmitter, in the classic concept of amateur radio operation is performing *local control*. If he is at a distant control point, he is performing his functions by *remote control* through a control link. When some means other than having the control operator on duty at all times is used to control a station, we consider this to be *automatic control*. Only repeater stations and auxiliary link stations used in repeater systems are being proposed for automatic control in the Amateur Radio Service.

4. Because of the unique privileges authorized, there are special responsibilities incumbent upon the licensee and the control operator

of remotely controlled stations and repeater stations. Unlike most other radio services, we do not assign specific operational frequencies to amateur stations. All amateur frequencies are available, depending upon one's operator license class, on a first come, first served basis. Most of these frequencies must be shared by amateurs throughout the world, using all types of emissions, for a variety of amateur purposes. Moreover, some frequencies must be shared with non-amateur stations. The fundamental means for making such a system practical is that the control operator of each amateur station selects any specific operating frequency by first determining there are no communications already thereon. In the event there are, he either waits for that frequency to clear, or moves to an unoccupied frequency. Indiscriminate frequency selection can result in non-compliance with § 97.125 which prohibits deliberate interference. While there may be some advantages in discontinuing this system in favor of frequency assignments for repeaters, and possibly other kinds of amateur stations, we believe the traditional method continues to be the best one for the Amateur Radio Service. Coordination of operating frequencies among amateurs is necessary, however, to make the most effective use of the allocated bands. Licensing a station for remote control does not imply any less control is required. The basic premise for permitting remote control of an amateur radio station is that amateur technology is adequate to provide the same degree of control over a remotely controlled station, in so far as compliance with the rules is concerned, as does local control.

5. In most amateur repeater stations which have come to our attention, efficient operation has been achieved through persistent self-enforcement efforts by the amateurs involved. Unfortunately, for a few stations this is not the situation. The control operator of a repeater station has additional responsibilities even beyond those incumbent upon the control operator of a non-repeater station. He has the job of screening out prohibited practices, such as music, broadcasting, commercial traffic, etc. While the repeater may not be the originator of these types of transmissions, the repeater station licensee and control operator are nonetheless responsible for the proper operation of the station. They must receive a high degree of cooperation from other amateurs making use of the station, in order to make repeater stations in the Amateur Radio Service practical. While the control operator must make certain that other radio signals, either amateur or non-amateur, not intended for retransmission are not repeated, it should be obvious to all amateurs that transmissions in the repeater segments of the amateur frequency bands should be limited to those intended to be retransmitted. This is particularly true for transmissions in the frequency regions where the generally accepted repeater input channels are situated, such as 146.01–146.46 MHz and 147.60–147.99 MHz. Stations conducting simplex communications on these frequencies in areas where their transmission could be repeated should expect them to be repeated.

6. Some amateurs have developed a number of techniques to relieve the control operator from personally performing many routine control functions. For instance, several remotely controlled repeater stations use devices to disable the repeater transmitter in order to prevent interference to other stations already transmitting on the frequency. Other

repeaters use secondary control systems, ranging from simple to complex, to limit access to the repeater to users of their choice. Still others use devices to monitor the technical performance of the station, which automatically shuts down the station if it is not within the desired standards. An automatic recorder is often used for logging third party traffic activity. The use of such techniques appear to make automatic control of an amateur repeater station practical. This is being demonstrated under Special Temporary Authorization by several amateur repeater stations.

7. In some, if not most, amateur repeater stations, where full cooperation by the users is obtained, the control operator's function is usually completely passive. He only needs to monitor the communications to verify the continuing proper operation of the station. We suspect, in such instances, the necessity for real time monitoring by a control operator may be unnecessary. These stations can operate properly under automatic control, with the monitoring accomplished on a delayed basis. Regrettably, from the types of problems encountered by some repeater stations that have come to our attention, it is apparent that not all repeater stations would be able to operate by automatic control at all times. Where the equipment is not sufficiently reliable to leave unattended, or where the necessary automatic functions are not incorporated, or where full cooperation by the users is not obtained, automatic control is not practical. For these stations, operation by local control or remote control is the only practical means, at least during certain time periods when the violations would otherwise occur.

8. Therefore, we are proposing to expand the definitions in § 97.3(n), as shown in the Appendix, to include automatic control, in addition to local and remote control. Automatic control would only apply to repeater stations as described in the foregoing, and to certain auxiliary link stations used in conjunction with repeater stations under this type of control. New § 97.110(c) and § 97.111(g) would be added to provide for these new types of control.

9. In order to operate a repeater station by automatic control, the station would first be licensed as a repeater station, in the conventional manner, for either local control or for remote control. Specific authorization for automatic control would not be required. However, certain provisions must be effected, as set forth in detail in the Appendix. These include a requirement that sufficient information must be filed with the Engineer in Charge to enable him to order a station shutdown should the need arise. The control operator designated by the repeater station licensee must be available on call at all times the station is under automatic control. All radio communications through an automatically controlled repeater must be recorded and reviewed within 72 hours by the control operator(s), for rule compliance. In the event violations did occur, the licensee would be obligated to take the steps necessary to prevent a recurrence, or else may only operate the station by local or remote control. Should the improper operation of a repeater station while under automatic control come to our attention, we would then impose restrictions against further automatic control of that station until such time as the licensee can show that future operation of the station by such control will result in compliance with the rules.

10. Depending upon the actual situation, there are several steps the licensee of a repeater station desiring to operate his station by automatic control can take to preclude many of the abuses encountered with amateur repeaters. For instance, if commercial third party traffic by automatic telephone system inter-connect becomes a problem, this function could be discontinued during periods of automatic control. The repeater might have to be restricted to only emergency communications, if other means to secure the cooperation of all users are not successful. Possibly, the repeater could only be operated by automatic control during certain periods each day, such as during the late night hours. Another method is to employ a semi-automatic control system, where access to the repeater is only possible for those users selected by the station licensee. Undoubtedly, the imagination and ingenuity of amateurs can devise even more methods to solve these and other problems. However, proper operation of a repeater station by automatic control would always depend heavily upon cooperation from others. The self-policing claims and reputation long associated with amateurs would be thoroughly tested by this proposed method of repeater control.

11. The specific rule changes proposed herein are set forth in the attached Appendix. Authority for these proposed amendments is contained in Section 4(i) and 303 of the Communications Act of 1934, as amended.

12. Pursuant to applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before October 30, 1974, and reply comments on or before November 16, 1974. In accordance with the provisions of § 1.419(b) of the Commission's Rules, an original and fourteen copies of all statements, briefs, and comments filed shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken. The Commission may also take into account other relevant information before it, in addition to specific comments invited by this Notice. Responses will be available for public inspection during regular business hours in the Commission's Broadcast and Docket reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. § 97.3(n) is amended to read as follows:

§ 97.3(n) DEFINITIONS.

* * * * * * * *

(n) *Control.* Techniques for accomplishing the prerequisite responsibilities in the immediate operation of an amateur radio station. Must be one or more of the following:

Local control. Manual control, with the control operator monitoring the operation on duty at the control point located at the station transmitter(s), such that the associated operating adjustment are directly accessible. (Direct mechanical control, or direct wire control of a transmitter from a control point located on

board any aircraft, vessel, or on the same premises on which the transmitter(s) is located, is also considered local control).

Remote control. Manual control, with the control operator monitoring the operation on duty at a control point located elsewhere than at the station transmitter(s), such that the associated operating adjustments are accessible through a control link.

Automatic control. The use of devices and procedures for control such that the duty control operator does not have to be present at the control point at all times. (Only rules for automatic control of repeater station systems have been adopted. Automatic control of all other types of amateur radio stations must be approved by the Commission on a case-by-case basis).

* * * * * * *

2. § 97.79(b) is amended to read as follows:

§ 97.79 CONTROL OPERATOR REQUIREMENTS.

* * * * * * *

(b) Every amateur radio station, when in operation, shall have a control operator. The control operator shall be on duty at an authorized control point, except where the station is under automatic control. The control operator may be the station licensee, if a licensed amateur radio operator, or may be another amateur radio operator with the required class of license and designated by the station licensee. The control operator, when on duty, shall also be responsible, together with the station licensee, for the proper operation of the station.

* * * * * * *

3. Add new § 97.110(c) to read as follows:

§ 97.110 OPERATION OF AN AUXILIARY LINK STATION.

* * * * * * *

(c) An auxiliary link station(s) licensed either for local control or for remote control, may also be operated under automatic control when it is licensed in a repeater station system being operated under automatic control. Both the auxiliary link station(s) and the repeater station must appear on the system network diagram on file with the Commission.

4. Add § 97.111(g) to read as follows:

§ 97.111 OPERATION OF A REPEATER STATION.

* * * * * * *

(g) A repeater station licensed either for local control or for remote control, may also be operated under automatic control where:

(1) Devices and procedures have been implemented such that compliance with the rules can be accomplished without the duty control operator present at the control point at all times the station is in operation.

(2) All radio communications transmitted by the station are monitored by the duty control operator in real time, or reviewed within 72 hours. In the event a violation is detected, the repeater station licensee must take the necessary steps to prevent a recurrence.

(3) All radio communications transmitted by the station are recorded such that they can be reproduced. The recordings shall be:

(i) Preserved for a period of at least 30 days,

(ii) Retained in the possession of the station licensee, and

(iii) Made available to the Commission upon request.

(4) The name of the station licensee, and the names of designated control operators, together with appropriate information so the duty control operator may be readily notified by Commission personnel to effect a prompt shutdown of the station, has been filed with the Engineer in Charge of the radio district in which automatic control of the station(s) is intended. This notification shall have been filed within the past year, or at the time of any change thereto, whichever is most recent.

(5) Upon notification from the Engineer in Charge, or other Commission Representative, of improper station operation under automatic control, said operation must be immediately discontinued until all deficiencies have been corrected and the Commission so notified. Otherwise, the station(s) may only be operated under local control, or under remote control if authorized.

FCC 74-763

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF BEL AIR BROADCASTING CO., INC., LICENSEE OF RADIO STATION WVOB, BEL AIR, MD.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted July 10, 1974; Released July 22, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND QUELLO CONCURRING IN THE REDUCTION OF THE FORFEITURE; COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has under consideration (1) its Notice of Apparent Liability to Bel Air Broadcasting Company, Inc., for forfeiture of $3,000 (FCC 73-697), issued June 27, 1973, 41 FCC 2d 848, and (2) the response of licensee to that Notice, dated July 23, 1973, which will be treated as an application for remission or mitigation of the forfeiture proposed in the referenced Notice.

2. Standard broadcast station WVOB, Bel Air, Maryland, is licensed to Bel Air Broadcasting Company, Inc. The Notice of Apparent Liability in this matter was issued to Bel Air for its apparent failure to comply with the affirmative obligations set forth in Section 73.123(c) of the Commission's Rules[1] "sufficiently far in advance of the broadcast" of an editorial which, the Commission found, constituted a statement of the station's opposition to two legally qualified candidates seeking reelection to the Bel Air, Maryland, Board of Town Commissioners. The Commission additionally found that the imposition of the proposed forfeiture was legally justified since the apparent violations were "willful or repeated" and thus comported with the mandate imposed by Section 503(b)(1)(B) of the Communications Act of 1934, as amended.[2]

3. The Commission's inquiry into the station's operation was initiated following the January 31, 1973 complaint of five individuals. The complaint, filed and transmitted over the signature of Payson Getz, joined as complainants four other individuals. At the time of the complaint's filing, each complainant was a member of the Bel Air Board of Town Commissioners. Two of the five complainants, Messrs. Barnes and Hicks, however, were also incumbent candidates for reelection to membership of that Board in an election held on December 4, 1972.

4. It is undisputed that from December 1 through December 4, 1972,

[1] 47 C.F.R. 73.123(c).
[2] 47 U.S.C. 503(b)(1)(B).

the station broadcast the following remarks, identified at the time of broadcast as a station editorial:

> Perhaps never in the history of the Town of Bel Air has a Town election been so important to insure the future of our community. The existing Board has gone to great lengths in past issues of the local newspaper to emphasize that they were not so-called puppets to a power regime. The truth of the matter lies within the fact of why they should have to go to such lengths to point out they are individuals when it could have been done more effectively through their independent actions.
>
> Conversations on the streets of Bel Air indicate considerable displeasure with the current Board and some of their tactless decisions of the past. Included among these are the popular private meetings or executive sessions, which only creates a credibility gap between the constituents and their elected officials. It's difficult for us to subscribe to this week's endorsement of the existing Board members by a local newspaper. It is even less advisable when residents of Bel Air cannot move around town during the rush hours of Friday and Saturday because of the traffic patterns. Where are the solutions that this Board should have come up with, during the past two years? Why does the Chairman of the Board feel it is so important for him to attend the National Mayors Conference in Honolulu and how much did it cost the taxpayers for him to go? These are all questions that the Bel Air resident is asking. *We believe that the voters of Bel Air should look upon Monday's election as a chance to institute a change.* Fortunately, all of the registered candidates have their strong points, but some far exceed others in experience and motivation. *It is the editorial opinion of this station that a change is necessary and urge you to vote for that change Monday, December 4th.* This has been a WVOB Editorial. [Emphasis added]

This WVOB editorial was broadcast approximately hourly on the dates referenced above and it is uncontested that neither prior to nor following the broadcasts involved here did the station (a) notify complainants Barnes and Hicks of the dates and times the editorial was to be presented, (b) supply a script or tape of the editorial, and (c) offer to Barnes and Hicks a "reasonable opportunity to respond" to those editorial remarks. Complainants Barnes and Hicks challenged the station's conduct under Section 73.123(c) of the Commission's Rules, asserting that the above recited editorial constituted a licensee editorial opposing their candidacies within the contemplation of the Rule; that the editorial questioned was broadcast clearly within a 72-hour period prior to election day; and that the station's failure to meet the affirmative obligations of the Rule "sufficiently far in advance of the broadcast(s)" constituted violations of the Rule.

5. Bel Air, in response to Commission inquiry, argued that the obligations imposed by Section 73.123(c) of the Rules were not triggered since "no candidate was personally endorsed and no candidate was personally opposed" in the editorial and further, that the Rule would have been brought into play only if the editorial had "named a candidate either way." Additionally, Bel Air disclaimed liability for violating the Rule, asserting that following the various broadcasts of the editorial a broad statement offering interested parties the opportunity to respond was presented.

6. On the basis of these apparent facts, the Commission issued a Notice of Apparent Liability for forfeiture in the amount of three thousand dollars ($3,000) to Bel Air for willfully or repeatedly failing to comply with the mandates set forth in Section 73.123(c) of the Commission's Rules. Specifically, it appeared that the WVOB editorial, broadcast hourly from December 1 through December 4, 1972, was a licensee editorial opposing the legally qualified candidacies of

complainants Barnes and Hicks; that the editorial was broadcast on each of the three days prior to the election as well as on election day and thus well within the 72-hour period established by the Rule during which licensees broadcasting such editorial oppositions must meet the Rule's affirmative obligations "sufficiently far in advance of the broadcast"; and that the station neither prior to nor following the broadcast of the WVOB editorial (a) notified complainants of the dates and times of the broadcasts, (b) provided them with a script or tape of the questioned editorial, and (c) provided complainants with an opportunity to respond to the editorial. In holding that this conduct constituted an apparent violation of Section 73.123(c) of the Commission's Rules, we stated that although the above recited WVOB editorial did not oppose Barnes and Hicks by name, the editorial nevertheless constituted a licensee statement of opposition to those two candidates since the editorial clearly urged a change in the composition of the then current Board whose only members for reelection were Barnes and Hicks. In our Notice of Apparent Liability to Bel Air, we concluded that those explicit statements in the WVOB editorial "urging voters to cast their ballots for a change in the composition of the Town Board when two members of the then existing Board were seeking reelection to the vacated seats can only be considered a statement of (licensee) opposition to the candidacies of Barnes and Hicks, the incumbents, even though these candidates were not expressly identified by name in the editorial."

7. In response to the Notice of Apparent Liability, Bel Air does not challenge the Commission's determination that the WVOB editorial, broadcast from December 1 through December 4, 1972, was the type of licensee editorial in opposition to legally qualified candidates within the contemplation of Section 73.123(c) of the Commission's Rules. Nor does it contest the Rule's interpretation that the broadcast of that editorial within 72 hours of election day required Bel Air to meet the affirmative obligations set forth in the Rule "sufficiently far in advance of the broadcast(s)" involved. Bel Air does argue, in mitigation of the forfeiture proposed, that the fine is much too severe, in light of the following circumstances: (1) the station's conduct evidenced no intention to violate the Rule, to wit there existed a "sincere difference of opinion" about the proper interpretation of the Rule's meaning; (2) that Bel Air's conduct as a licensee in the past has represented the conduct of an "exceptional public servant"; and (3) that the imposition of a three-thousand dollar ($3,000) forfeiture against a 250 watt station would effectively stifle this licensee's editorializing, that is "many small broadcasters (would) fail to editorialize because they are constantly running scared of the numerous technicalities that can be violated because of (licensees') erroneous interpretation of FCC rules and regulations . . ." Licensee concludes its argument on the following note:

> My point is, that by trying to do what the Commission desires, and lacking the experience and professional knowledge of a commission attorney, I made an honest error in judgment, one of which I feel I was chastized for far too severely. Other small stations in our market don't editorialize, perhaps because they are afraid.

8. Because Bel Air does not question the Commission's determination that the WVOB editorial constituted a licensee opposition to the candidacies of Barnes and Hicks and that the station failed, therefore, to observe the obligations imposed upon it under Section 73.123(c) by not providing the necessary information to the candidates "sufficiently far in advance of the broadcast" of the editorial, the Commission will not treat this aspect of the matter at great length except to remind licensees of their obligations under the Rule.[3] Just as important as the affirmative obligations established in the political editorial rule is the primary obligation of licensees to recognize that the Rule is triggered when the licensee broadcasts editorial comments which oppose a legally qualified candidate, although the candidate is not expressly identified by name. The principle affirmed here is not novel but finds its basis in fairness doctrine decisions promulgated prior to the adoption of Section 73.123(c) in 1967. See for example and historical development, *Times-Mirror Broadcasting Co.*, 40 FCC 531 (1962); *McBride Industries, Inc.*, 40 FCC 573 (1963); Notice of Proposed Rulemaking, "Personal attacks; Political Editorials," FCC 66–291, 31 Fed. Reg. 5710, 5711 (1966); "Personal Attacks; Political Editorials," 8 FCC 2d 721, 722 and 727 (1967). When the Commission found that Bel Air had apparently violated Section 73.123(c) in its Notice of Apparent Liability, it noted that although candidates Barnes and Hicks were not expressly identified in the WVOB editorial, the challenged editorial in explicit terms urged a change in the composition of the Town Board. Thus, by direct and precise implication, since Barnes and Hicks were the only candidates who sought reelection to the two vacant seats on the Town Board out of a field of seven, the editorial could only be read as a statement of the licensee's opposition to their candidacies for the offices, thereby bringing into play the requirements set forth in the Rule. As the Rule requires, the licensee's recognition and implementation of these obligations becomes paramount when the editorial opposing a candidate or candidates is broadcast within 72 hours of election day so that the opposed candidates are equipped to prepare a response and present it in a timely fashion, something that the opposed candidates here were never given the opportunity to accomplish.

9. A licensee may be required to forfeit for violation of a provision of the Act or the Commission's Rules if the facts disclose that the violation found was willful or repeated. 47 U.S.C. 503(b)(1)(B). It is only necessary that one of these two conditions be found as a condition for forfeiture liability, and when the violations are found to be "repeated," it is unnecessary for the Commission to consider whether the violations are willful. *Friendly Broadcasting Co.*, 45 FCC 46 (1962); *KOKE, Inc.*, 23 FCC 2d 191 (1970). That the challenged editorials were broadcast hourly on the three days prior to the election

[3] Section 73.123(c) of the Commission's Rules requires: (c) Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (1) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (a) notification of the date and the time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

involved here, as well as on election day, reveal that the violations found were repeated within the terms and usage of Section 503(b)(1)(B) of the Act.

10. In light of the foregoing, a forfeiture is warranted. However, in view of all of the circumstances herein, we believe that the amount of the forfeiture should be reduced to $2,000.

11. Accordingly, IT IS ORDERED, That Bel Air Broadcasting Company, Inc., licensee of standard broadcast station WVOB, Bel Air, Maryland, FORFEIT to the Federal Communications Commission the sum of two thousand dollars ($2,000) for its repeated failure to observe the obligations set forth in Section 73.123(c) of the Commission's Rules and Regulations. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of the forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

47 F.C.C. 2d

109-004—74——3

FCC 74-802

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 76, SUBPART D, OF THE COMMISSION'S RULES CONCERNING CARRIAGE OF TELEVISION BROADCAST SIGNALS IN THE CABLE TELEVISION SERVICE

ORDER

(Adopted July 17, 1974; Released July 24, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. Section 76.51 of the Commission's Rules for cable television lists the first 100 major television markets in the United States. In Section 76.5(g), we have defined these markets to be:

> The specified zone of a commercial television station licensed to a community listed in Section 76.51, or a combination of such specified zones where more than one community is listed.

One of the combined or hyphenated major markets is Kalamazoo-Grand Rapids-Muskegon-Battle Creek, Michigan (#37).

2. It has come to our attention that no commercial television station is now serving or authorized to serve Muskegon, Michigan. On October 2, 1967, a construction permit was granted to Muskegon Telecasting Company, Inc., for Channel 54, Muskegon, Michigan; however, the construction permit was cancelled on October 15, 1971, at the request of the permittee, and this allocation has remained available ever since. Consequently, the area surrounding the City of Muskegon no longer fits our definition of a television market. We will therefore amend Section 76.51 of the Rules to delete Muskegon from the 37th major television market.

3. This amendment is designed to relieve unnecessary burdens and expedite Commission proceedings with respect to matters that our experience indicates are not the subject of dispute. Accordingly, we conclude that the effective date, prior notice of rulemaking and public proceedings thereon are unnecessary, pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. Similarly, delay in implementing this amendment would be contrary to the public interest.

4. Authority for the rule amendment adopted herein is contained in Sections 2, 4(i) and (j), 303, 307, 308, and 309 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That effective July 31, 1974, Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 76—Cable Television Service

1. Section 76.51(a)(37) is amended as follows:

§ 76.51 MAJOR TELEVISION MARKETS

(a) * * *

(37) Kalamazoo-Grand Rapids-Battle Creek, Michigan.

* * * * * * *

FCC 74-718

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

LIST OF STATE EDUCATIONAL TELEVISION AUTHORITIES FOR PURPOSES OF CABLE TELEVISION RULES

JULY 8, 1974.

The Commission by Commissioner Wiley (Chairman), Lee, Reid, Hooks, and Quello, issued the following Public Notice:

FCC ADOPTS LIST OF STATE EDUCATIONAL TELEVISION AUTHORITIES FOR PURPOSES OF CABLE TELEVISION RULES

Section 76.13(a)(6), (b)(6), and (c)(4) of the Commission's cable television rules require that specified information in all applications for certificates of compliance be served on "any local or state educational television authorities."

In the absence of a recognized list of state educational television authorities, there has been much uncertainty concerning which states have such authorities and where they are located.

The Commission has established a list of such state educational agencies, compiled from information supplied by the Department of Health, Education, and Welfare, the National Association of Educational Broadcasters, and the state agencies themselves. This list does not include any local or county educational authorities. The Commission hereby adopts this list, a copy of which is attached, and any revisions thereof, as its official list of state educational television authorities for purposes of the cable television rules, in order to eliminate the uncertainties described above.

In order to allow time for this list to be publicized, and to avoid confusion in the processing of pending applications for certificates of compliance, the list will become effective on August 1, 1974.

Florida:
ETV Director
State Department of Education
Avant Building
Tallahassee, Florida 32304

Georgia:
Executive Director
Georgia ETV Network
1540 Stewart Avenue, S.W.
Atlanta, Georgia 30310

Hawaii:
Hawaii Public Television Authority
2350 Dole Street
Honolulu, Hawaii 96822

Idaho:
Chairman
State Educational TV and Radio Board
Len B. Jordan Building
State Capitol Complex
Boise, Idaho 83720

Illinois:
Director, ETV/ITV
Office of the Superintendent of Public Instruction
325 South Fifth Street
Springfield, Illinois 62706

Indiana:
Executive Director
Indiana Higher Education Telecommunications System
1100 West Michigan Street
Indianapolis, Indiana 46202

Iowa:
Director
Iowa Educational Broadcasting Network
Box 1758
Des Moines, Iowa 50306

Kansas:
Executive Director, Public Television Commission
Kansas State Capital
535 Kansas Avenue
Topeka, Kansas 66063

Kentucky:
Executive Director
Kentucky Authority for ETV
600 Cooper Drive
Lexington, Kentucky 40502

Louisiana:
Executive Director
Louisiana ETV Authority
Box 44064
Baton Rouge, Louisiana 70804

Maine:
General Manager
Maine Public Broadcasting Network
Alumni Hall, University of Maine
Orono, Maine 04473

Maryland:
Executive Director
Maryland Center for Public Broadcasting
Bonita Avenue
Owings Mills, Maryland 21117

Massachusetts:
Executive Director
Massachusetts Executive Committee for ETV
55 A Chapel Street
Newton, Massachusetts 02160

Michigan:
State Superintendent of Public Instruction
Department of Education
Box 420
Lansing, Michigan 48902

Minnesota:
Executive Secretary
Minnesota State Educational Television Network
1640 Como Avenue
St. Paul, Minnesota 55108

Mississippi:
Executive Director
Mississippi Authority for ETV
P.O. Drawer 1101
Jackson, Mississippi 39205

Missouri:
Secretary, Instructional Television Council
State Department of Education
P.O. Box 480
Jefferson City, Missouri 65101

Montana:
Chairman, Educational Broadcasting Commission
Box A
Bozeman, Montana 59715

Nebraska:
General Manager
Nebraska ETV Commission
P.O. Box 83111
Lincoln, Nebraska 68501

Nevada:
Executive Director
Nevada Educational Communications Commission
Carson City, Nevada 89701

New Hampshire:
Manager
New Hampshire ETV Network
Box Z
Durham, New Hampshire 03824

New Jersey:
Executive Director
New Jersey Public Broadcasting Authority
1573 Parkside Avenue
Trenton, New Jersey 08638

New Mexico:
Director
Governor's Commission on Statewide Television for Educational Purposes
c/o Board of Educational Finance
201 Legislative Building
Santa Fe, New Mexico 87501

New York:
Chief
Bureau of Mass Communications
State Education Department
Albany, New York 12224

North Carolina:
Director of ETV
University of North Carolina Network
Chapel Hill, North Carolina 27514

North Dakota:
Chairman
North Dakota Educational Broadcasting Council
P.O. Box 2926
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Fargo, North Dakota 58102

Ohio:
Executive Director
Ohio ETV Network
2470 North Star Road
Columbus, Ohio 43221

Oklahoma:
Director
Oklahoma ETV Authority
1700 Asp Street
Norman, Oklahoma 73069

Oregon:
Director
Oregon Educational and Public Broadcasting Service
P.O. Box 1097
Portland, Oregon 97207

Pennsylvania:
Executive Director
Pennsylvania Public Television Network
169 West Chocolate Avenue
Hershey, Pennsylvania 17033

Rhode Island:
Chairman
Board of Regents for Education
State of Rhode Island and Providence Plantations
199 Promenade Street
Providence, Rhode Island

South Carolina:
President
South Carolina ETV Commission
P.O. Drawer L
2712 Millwood Avenue
Columbia, South Carolina 29205

South Dakota:
Executive Director
State Board of Directors of Educational Television
310 East Clark Street
Vermillion, South Dakota 57069

Tennessee:
Director
Educational Television and Radio
135A Cordell Hull Building
Nashville, Tennessee 37219

Utah:
Coordinator, Statewide Television
Utah State Board of Regents—Commission on Higher Education
1201 University Club Building
Salt Lake City, Utah 84111

Vermont:
Dean of Continuing Education
Vermont Educational Television Broadcasting Council
University of Vermont
Grasse Mount
Burlington, Vermont 05401

Virginia:
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Virginia Public Telecommunications Council
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Washington:
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Washington State ETV Commission
5415 Beach Drive, S.W.
Seattle, Washington 98136

West Virginia:
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West Virginia Educational Broadcasting Authority
Suite B—424 State Capitol
Charleston, West Virginia 25305

Wisconsin:
Executive Director
Educational Communications Board
732 North Midvale Boulevard
Madison, Wisconsin 53705

FCC 74-775

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CABLE TV PUGET SOUND, GREATER WEST PIERCE COUNTY, WASH.	CAC-1798 WA180
CABLE TV PUGET SOUND, SOUTH KING COUNTY, WASH.	CAC-1799 WA181
CABLE TV PUGET SOUND, EAST PIERCE COUNTY, WASH.	CAC-1800 WA182
CABLE TV PUGET SOUND, PENINSULA, WASH.	CAC-1801 WA183
CABLE TV PUGET SOUND, FIRCREST, WASH.	CAC-1802 WA041
CABLE TV PUGET SOUND, SUMNER, WASH.	CAC-1803 WA050
CABLE TV PUGET SOUND, MILTON, WASH.	CAC-1804 WA043
CABLE TV PUGET SOUND, FIFE, WASH.	CAC-1805 WA040
CABLE TV PUGET SOUND, PUYALLUP, WASH. For Certificates of Compliance	CAC-1806 WA049

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 29, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. Cable TV Puget Sound filed on December 9, 1972, the above-captioned applications for certificates of compliance to add two Canadian television broadcast signals to its existing cable television systems serving the unincorporated areas of Greater West Pierce County, East Pierce County, South King County and the Peninsula as well as the incorporated cities of Fircrest, Sumner, Milton, Fife, and Puyallup, in the State of Washington. These systems are all located within the Seattle-Tacoma major television market (#20). Puget Sound's current carriage consists of the following:

KCTS-TV (Educ., Channel 9) Seattle, Washington
KING-TV (NBC, Channel 5) Seattle, Washington
KIRO-TV (CBS, Channel 7) Seattle, Washington
KOMO-TV (ABC, Channel 4) Seattle, Washington
KTNT-TV (Ind., Channel 11) Tacoma, Washington
KPEC-TV (Educ., Channel 56) Tacoma, Washington
KTPS (Educ., Channel 62), Tacoma, Washington
KTVW (Ind., Channel 13) Tacoma, Washington

Pursuant to Section 76.13(b) of the Commission's Rules, Puget Sound initially requested carriage of the following additional signals:

CHEK–TV (CBC, Channel 6) Vancouver, British Columbia
CHAN–TV (CTV, Channel 8) Vancouver, British Columbia

Puget Sound alleged that carriage of these additional signals would be consistent with Section 76.61 of the Commission's Rules inasmuch as its systems were presently carrying only two independent signals. A third independent station may be carried to provide its subscribers with the "minimum service" specified in Section 76.61(b) and an additional independent signal may be carried pursuant to Section 76.61(c), which allows two additional bonus independent signals reduced by the number of signals added to the system to meet the "minimum service" standards.

2. On February 15, 1973, oppositions to these applications were filed by two of the three Seattle network affiliates: KIRO, Inc., licensee of Station KIRO–TV; and Fisher's Blend Station, Inc., licensee of Station KOMO–TV. These stations contended that the signals which Puget Sound proposes to carry do not qualify as independent stations under the definition in Section 76.5(n) of the Rules[1] and thus may not be carried consistently with Section 76.61. In support of their argument, the licensees cited *King Videocable Company*, 39 FCC 2d 600 (1973), which expressly held that CHEK–TV, regardless of its foreign network affiliation, is not an independent station under Section 76.5(n) because it carries more than 10 prime time hours of U.S. network programming per week. As Fisher's Blend further pointed out, CHAN–TV carries even more U.S. network-offered programs during prime time than CHEK–TV.[2] Consequently, it argued that the *King Videocable* rationale would *a fortiori* prohibit carriage of CHAN–TV as well as CHEK–TV.

3. On March 7, 1973, Puget Sound filed a "Reply to Opposition to Applications for Certificate of Compliance and Petition For Special Relief" in which it petitions the Commission for special relief pursuant to Section 76.7 to carry the requested Canadian television stations. Puget Sound argues that the policy of *King Videocable* should be abandoned as a matter of comity and international goodwill and because the carriage of these signals on other systems operating in the nearby area places it in an unfair competitive position. It also contends that *King Videocable* is "discriminatory" and that Section 76.5(n) should not apply to Canadian stations because Canadian cable systems carry United States television signals and the public interest requires the free flow of commerce and communication across the northern border.

4. On April 13, 1973, both Fisher's Blend and KIRO, Inc. filed oppositions to Puget Sound's petition. Subsequently, on May 10, 1973, Puget Sound amended its application to replace CHEK–TV with Television Broadcast Station CBUT, Vancouver, British Columbia,

[1] Section 76.5(n) of the Rules defines an independent station as—A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks.

[2] Fisher's Blend took a survey of CHAN–TV's American network programming for the entire 19 week Fall, 1972 television season. It found that CHAN–TV carried U.S. national network-offered programs an average of 14 hours per week, carrying in prime time 10 hours per week or more all 19 weeks.

Canada, which qualifies as an independent station under Section 76.5 (n). Moreover, in its "Reply to Oppositions to Petition for Special Relief" filed on May 3, 1973, Puget Sound promised to afford local station pre-release as well as simultaneous network program non-duplication protection against both CHAN–TV and CBUT. KIRO–TV in its filing of June 19, 1973, accepted the plan. Fisher's Blend in its "Comments on Amendment to Application" persisted in its objection to carriage of CHAN–TV on the grounds that Puget Sound did not make the requisite substantial showing to warrant waiver of the signal carriage rules.

5. We agree with Fisher's Blend that Petitioner has not presented sufficient grounds for changing our policy in *King Videocable* for purposes of allowing carriage of CHAN–TV. The Commission's Rules are expressly designed to apply equally to both United States and foreign television stations and no provision is made for special treatment of signals received from outside the United States. In fact, the definition of "television broadcast station" in Section 76.5(b) specifically includes "any television broadcast station licensed by a foreign government" with the proviso:

> That a television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage . . . but may otherwise be carried if consistent with the rules.

Carriage of CHAN–TV is not consistent with the rules since it is undisputed that the station is a partial network station according to Section 76.5(n) as interpreted by *King Videocable*. Puget Sound's argument that the Commission should certify carriage of CHAN–TV because other systems in the Seattle-Tacoma area carry Canadian signals also must be rejected. The Canadian signals carried by these systems were authorized prior to March 31, 1972, and thus may continue to be carried pursuant to the grandfathering provision of Section 76.65. Although other systems operating in communities served by systems which carry grandfathered signals may likewise carry these signals, we have previously held that systems operating in neighboring communities may not avail themselves of this privilege. *New Worlds Cable TV, Inc.*, 37 FCC 2d 792 (1972). Since Puget Sound's systems are not located in any of the communities whose systems carry grandfathered signals,[3] carriage of CHAN–TV is not consistent with our carriage rules. We find, however, that Section 76.61(b) of the Rules permits carriage of CBUT, the substituted independent station, to fulfill Puget Sound's "minimum service" complement. Of course, carriage of CBUT will have to comply with applicable Commission Rules including the program exclusivity provisions of Sections 76.91 and 76.155.

6. As a *quid pro quo* for certification of carriage of CBUT, Section 76.251(c) of the Rules requires Puget Sound to provide one public access channel for each of the nine communities it serves. Puget Sound recognizes its obligation to initiate access services, but requests a temporary waiver of Section 76.251(c) to allow it to provide only one

[3] These systems are located in the communities of Des Moines, Encumclaw, Renton, Olympia, Everett, and Seattle, Washington.

such channel to be shared by the nine communities.[4] In support of its waiver requests, Puget Sound points out that the communities are predominantly residential suburban areas located within approximately a 9 mile radius surrounding the City of Tacoma, which is the business, trade and cultural hub for all the communities.[5] Consequently, it is asserted that the towns share with each other and Tacoma common civic, commercial, and social interests. Puget Sound further asserts that it serves the area with identical broadcast and nonbroadcast services carried over a single system integrated into a unified operation through microwave distribution of signals from one headend. Moreover, the applicant asserts that the small population of many of the areas indicates that they will be unlikely to generate any separate need for full access services but that it proposes to provide mobile studio facilities to minimize any possible restraint on access channel usage occasioned by distance between a subscriber's community of residence and Puget Sound's access studio facilities. Finally, Puget Sound argues that compelling reconstruction of its 12 channel systems to accommodate 9 access channels would at present be unduly burdensome.

7. In adopting our access cablecasting rules, we recognized that they might pose some problems for existing conglomerate systems, serving separate communities from the same headend. Para. 147, *Cable Television Report and Order*, 36 FCC 2d 143, 197 (1972); Para. 90, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 359 (1972). Since that time we have granted several temporary waivers of Section 76.251(c) upon showings that it would be technically and economically unfeasible to immediately construct separate access facilities, and that individuals living in the communities served would not, to any significant extent, be deprived of the access services they would receive if separate facilities were built. *TelePrompTer of Portsmouth, Inc.*, 43 FCC 2d 1232 (1973); *Montachusett Cable Television, Inc.*, 43 FCC 2d 445 (1973); *Cable TV of York*, 40 FCC 927 (1973); *Gerity Broadcasting Company*, 36 FCC 2d 69 (1973). Puget Sound submitted such a showing and, accordingly, will receive a temporary waiver of Section 76.251(c) until March 31, 1977. However, should sufficient

[4] Assuming that the Commission would certify both additional television signals, Puget Sound requested that a waiver of Section 76.251(c) extend to the required educational access channel. Since we are not now certifying a second additional signal, the question of providing an educational access channel will not be discussed.

[5] Population and numbers of cable subscribers in the individual communities are as follows:

Community	Population	Subscribers
Fircrest	5,651	368
Puyallup	14,742	1,317
Milton	2,600	130
Fife	1,458	49
Sumner	4,325	674
East Pierce County	47,987	1,196
Greater West Pierce County	87,256	4,560
Peninsula	12,421	197
South King County	85,825	496
Total	262,265	8,897

demand develop before that date, we expect Puget Sound to make additional channels available.

In view of foregoing, we find that a partial waiver of Section 76.251 of the Commission's Rules and a grant of the above-captioned applications for authorization to carry CBUT would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the opposition filed by Fisher's Blend Station, Inc., IS GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–1798 through CAC–1806), filed by Cable TV Puget Sound ARE GRANTED, to the extent indicated above, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–762

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CENTRAL CALIFORNIA COMMUNICATIONS CORP. For Renewal of Licenses for Stations KSBW–TV and KSBY–TV, Salinas and San Luis Obispo, Calif.	File Nos. BRCT–395, BRCT–308

MEMORANDUM OPINION AND ORDER

(Adopted July 10, 1974; Released July 19, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has before it for consideration the above captioned applications for renewal of licenses for Station KSBW–TV, Salinas, California and Station KSBY–TV, San Luis Obispo, California, both filed September 1, 1971 by Central California Communications Corporation, and a petition to deny those applications filed November 1, 1971 by Gill Industries, licensee of Station KNTV, San Jose, California, as well as other related pleadings and correspondence.[1]

2. Generally, Gill alleges that the service area of KNTV substantially coincides with that of KSBW–TV, and that there is active competition between the stations for audience and advertising. However, the broadcast rating services utilized by KNTV and KSBW–TV in their advertising sales efforts combine the audiences of KSBW–TV and KSBY–TV in the Salinas audience report, because the rating services consider KSBY–TV a satellite of KSBW–TV. Gill argues that this rating service practice, allegedly perpetuated by Central, makes it more difficult to sell advertising on KNTV and thereby causes Gill competitive injury.

3. With regard to the satellite status of KSBY–TV, Gill asserts that: since KSBY–TV operates as an almost total satellite of KSBW–TV, it does not adequately serve its community (San Luis Obispo); Central depresses the amount of local programming presented by KSBY–TV in order to maintain its satellite status; Central has incorrectly logged local programming on KSBY–TV's program logs and misrepresented its policy with regard to local programming on

[1] The related pleadings include: an Opposition and Motion to Dismiss filed by Central on November 26, 1971; a Supplement to Petition to Deny filed by Gill on September 1, 1972; and an Opposition to the Supplemental Petition to Deny filed by Central on September 8, 1972.

KSBY–TV; and KSBY–TV's status as a satellite has never been formally determined by the Commission.[2]

4. Gill therefore requests that we designate Central's renewal applications for hearing in order to determine the satellite status of KSBY–TV, and, whether, in view of various alleged misdeeds of the licensee, renewal of the licenses of KSBW–TV and KSBY–TV would serve the public interest, convenience and necessity. As the discussion below demonstrates, we are not persuaded that Gill has alleged sufficient specific facts to raise any question requiring a hearing on the alleged licensee misdeeds. However, Gill has raised a very basic question involving the Commission's satellite policy, and, whether under that policy, KSBY–TV should be considered a satellite of KSBW–TV. The history of our satellite policy and of Station KSBY–TV would be of help in resolving this question.

5. A television satellite station is a creature of necessity, created to provide television service to small communities and/or sparsely settled areas which are economically incapable of supporting their own local television station. The satellite is a regular television station, operating on a channel assigned to its principal community in our table of allocations (47 C.F.R. 73.606), and meeting all of our technical rules for television station operation. Normally a satellite is licensed to a television station in a nearby city and rebroadcasts the programming of that parent station. Further, the predicted service contours of the satellite station can overlap those of the parent station under an exemption to our duopoly rule (*1964 Multiple Ownership Rules, Memorandum Opinion and Order in Docket 14711*, 3 RR 2d 1554 (1964); 47 C.F.R. 73.636, Note 9).

6. In authorizing satellite stations, we have consistently expressed the hope that the satellite would someday become a full scale local television station (*1964 Multiple Ownership Rules*, *supra*). Therefore, where the satellite was originally licensed under the exemption to the duopoly rule, that exemption is continued after the station achieves independent operation, because: "Otherwise local programming would be kept off the air contrary to the public interest." *1964 Multiple Ownership Rules*, *supra.*; 47 C.F.R. 73.636, Note 9).

7. While satellites are permitted for economic reasons, their obvious attribute is the absence of programming locally originated at the satellite station.[3] We have therefore used a local programming yardstick to determine whether one of two commonly owned stations should be considered a satellite. Utilizing this test, the Commission has found that a station presenting local programming amounting to 4.7% of its broadcast week is a satellite in spite of the licensee's claim that it was not (*Eugene Television, Inc.*, 4 FCC 2d 232 (1966)), but a station proposing to originate 5% local programming was, on that basis, ruled

[2] On April 14, 1971, Gill (the petitioner herein) plead for the discontinuance of the operation of KSBY–TV as a satellite and the discontinuance of the selling of KSBY–TV and KSBW–TV by combined rates. That request was denied because the situation did not involve forced combined rates, but was a matter of the type of competition between stations which did not warrant Commission interference. In the pleadings currently before us, Gill again requests the same relief. See Memorandum Opinion and Order, FCC 71–689, released July 7, 1971.

[3] A satellite may be required to maintain a local studio and originate some programming, particularly where it operates in a market in competition with a non-satellite station (*Spanish International Communications Corporation*, 25 RR 2d 375 (1972)).

not to be a satellite (*KAKE-TV and Radio, Inc.*, 2 RR 2d 688 (1964)).

8. The determination of whether KSBY–TV should be considered a satellite would therefore turn on the percentage of locally originated San Luis Obispo programming presented on the station. But the history of KSBY–TV's operations raises a serious question as to whether this criterion can or should be applied. Construction of the station was initially authorized in March, 1953. In June 1956, the permit was transferred to Valley Enterprises, Inc., which, in July of the following year, assigned the license to Salinas Valley Broadcasting Corporation, the licensee of KSBW–TV, Salinas, California. Up until this point, the station had been operating independent of any other television station. The 1957 assignment application states: "The size of the market and other factors have proven that it is impossible to operate [KSBY–TV] as a separate facility at this time." The assignee proposed to present a total of 4.97% local (live) programming on KSBY–TV. In approving the assignment the Commission implicitly authorized the operation of KSBY–TV as a satellite of KSBW–TV, and that action was not inconsistent with our general satellite policy as outlined above.

9. However, in its 1959 renewal application, KSBY–TV reported a total of 9.5% local (live) programming broadcast during the composite week and proposed to continue those percentages without substantial change. Then, on March 9, 1961, KSBY–TV requested permission to identify itself as a "San Luis Obispo-Santa Maria" station. That request was opposed by KCOY, an applicant for a new television station in Santa Maria. While KSBY–TV's pleadings asserted that it was not a satellite station, we denied the dual city identification request, finding that KSBY–TV was a "semi" satellite of KSBW–TV and the dual city identification might impair the establishment of a truly local Santa Maria station.

10. In its renewal applications filed in 1962 and 1965, KSBY–TV reported 5.9% and 7.49% local live programming respectively, but its 1968 renewal application showed only 4.5% local programming. Thereafter, in November, 1969, KSBY–TV again requested dual city identification authority and again claimed to be an independently operated television station. The Commission denied that request on April 17, 1970 (FCC 70–383) noting that notwithstanding the station's satellite status, KSBY–TV held a competitive edge in the San Luis Obispo-Santa Maria area by reason of its common ownership with KSBW–TV. We concluded that a grant of the dual city identification request would give the station a further advantage over KCOY–TV, Santa Maria.

11. Pursuant to the rule enunciated in the *Eugene Television* and *KAKE* cases, *supra*, KSBY–TV was not a satellite between 1959 and 1968 since the station apparently broadcast sufficient local programming to be considered an independent operation. But, by the same test, KSBY–TV's 1968 and 1971 renewal applications indicate that the station was being operated as a satellite from 1968 to the present. It would serve no useful purpose to engage in an academic discussion of whether a licensee could slip back and forth across the programming borderline of the satellite definition. Rather, that definition

should be re-evaluated in terms of basic satellite policy, which permits satellites for economic reasons but promotes the achievement of full local station operation. While local programming is an indicant of the economic viability of a station, a definition of satellite based thereon turns on programming decisions which may be motivated by factors other than the economic ability of the satellite's service area to sustain a non-satellite operation. A better approach is available in the present situation.

12. The Commission has financial information supplied by KSBY–TV and by the two other television stations operating in the San Luis Obispo area, KCOY–TV (Santa Maria) and KEYT–TV (Santa Barbara). That data indicates that KSBY–TV operates with broadcast revenues, expenses and income not dissimilar from those of KCOY–TV and KEYT–TV. It therefore appears that KSBY–TV has achieved income which would be considered sufficient to support the station as a non-satellite operation. Utilizing this information, as well as Census data supplied by Gill, it is not necessary to look to indirect indicia of the San Luis Obispo area's ability to support KSBY–TV.[4] The area is clearly supporting the station's operation. Therefore, where KSBY–TV was permitted to operate as a satellite of KSBW–TV in 1957 on the basis of allegations that the San Luis Obispo area could not support an independent operation, current data indicates that the area can and is producing sufficient revenues to sustain KSBY–TV as a non-satellite station. Accordingly, the basic policy which permitted the operation of KSBY–TV as a satellite is no longer operative, and the station should no longer be so considered.

13. This approach is consistent with our satellite policy, and, where the financial information is available, it is superior to the local programming formula. A broadcaster needs no external encouragement to maximize revenues, and a satellite operation will therefore quite naturally become a full scale local television station when sufficient revenues are available to sustain such an operation. In addition, a satellite licensee could present as much local programming on the satellite as it may desire without fear of losing its satellite status as long as the financial reports do not show sufficient revenues to support an independent station. This approach therefore promotes the conversion of satellities to full scale local stations and provides no impediment to additional local programming on existing satellite stations.

14. While the determination that KSBY–TV should no longer be operated as a satellite of KSBW–TV disposes of the main thrust of Gill's petition, it is still necessary to discuss the specific allegations of licensee misconduct made in that pleading. Petitioner asserts that Central has maintained KSBY–TV as a satellite operation, severely limiting the amount of local programming presented, in order to gain an advantage in the rating books where, pursuant to rating services' policy, the satellite audience of KSBY–TV is reported along with the audience of KSBW–TV. Gill further contends that KSBY–TV has, over the years, decreased its local programming to a point where it no

[4] The Census data indicates that the population of the principal service area of KSBY–TV increased from 70,867 persons in 1950 to 171,098 in 1970.

longer serves the needs of San Luis Obispo (from 7.5% local in 1965 to 4.5% in 1968 and 2.6% in 1971). The petition argues that this reduction is more significant in the light of the population increases in KSBY–TV's service area which should have been accompanied by an increase, not a decrease, in local programming.

15. In addition, Gill alleges that KSBY–TV has attempted to inflate the magnitude of its local programming through logging violations and improper response of paragraph 5, Section IV–B of FCC Form 303. According to Petitioner, the KSBY–TV renewal application includes local programming which was not local to KSBY–TV but originated by KSBW–TV and rebroadcast by KSBY–TV. Gill further contends that KSBY–TV claims credit for 33:32 hours of recorded programming which did not originate at KSBY–TV but was rebroadcast from KSBW–TV. The petition therefore concludes that the local and recorded programs were incorrectly logged and included in KSBY–TV's response to paragraph 5. With regard to KSBY–TV's local news programs, petitioner asserts that a comparison of the KSBY–TV and KSBW–TV program logs for the allegedly independent 6:00 p.m. and 11:00 p.m. news programs indicates that the same commercial announcements were broadcast at the same time on each station. Gill therefore concludes that KSBY–TV did not broadcast an independent news program at that time, but merely rebroadcast the local news program originated by KSBW–TV.

16. In opposition, Central generally submits that it jointly programs KSBW–TV and KSBY–TV in order to fulfill its licensee responsibilities to serve the needs and interests of its service area, and that KSBY–TV regularly carries locally originated news, public affairs and other public service programs designed to serve the needs of the San Luis Obispo area. With specific regard to programming, the licensee asserts that KSBY–TV produces its own local programming which is logged as local, and that local programming produced by KSBW–TV and rebroadcast by KSBY–TV is also properly logged and reported as local because of the community of interest which exists between the closely proximate service areas of the two stations. On the subject of its news programming, Central alleges that the 6:00 p.m. and 11:00 p.m. news programs on KSBY–TV and KSBW–TV are distinct local news offerings, separately produced and presented by independent news staffs. The licensee concludes that the timing of the commercial announcements is a matter of coincidence.

17. In its supplement to petition to deny, Gill charges that KSBY–TV does not in fact have the capacity to broadcast local live programming. Referring to an application filed by Central on July 26, 1972, the petitioner contends that the KSBY–TV studio is not located in San Luis Obispo as shown on the KSBY–TV license but is located some 5.5 miles outside of town (BMLCT–739). Gill further asserts that BMLCT–739 reveals that there is no studio transmitter link between KSBY–TV's studio in San Luis Obispo and the transmitter site. The supplement concludes that KSBY–TV cannot originate local live programming from a studio within San Luis Obispo, and that the studio arrangement violates Section 73.613(b) of our Rules. In opposition, Central alleges that KSBY–TV can and does originate local

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programming from its San Luis Obispo studio by recording the program in town and taking the recordings to the mountain studio/transmitter site.

18. For the purposes of our discussion of the specific allegations of misconduct presented by the petition to deny, KSBY–TV will be treated as a satellite station. The pleadings demonstrate that both Gill and Central have so considered KSBY–TV, and any other application of Commission's Rules and policies based on the contrary determination herein would be inequitable. Therefore, in any instance where the standard applied to a satellite station differs from that applied to a non-satellite station, the satellite standard will govern our decision.

19. The contention that Central has limited local public service programming on KSBY–TV in order to maintain a rating advantage is totally without rational or factual merit. The satellite definition utilized by both major television rating services (A. C. Nielsen and American Research Bureau) concerns itself with the degree of independent programming *exclusive* of news, weather, sports, editorials, and public service programming.[5] The amount of such public service programming independently presented by KSBY–TV in response to San Luis Obispo needs therefore has no bearing on the rating services' definition of a satellite or the rating services' decision to report the KSBY–TV's audience in the Salinas-Monterey rating book as an addendum to the KSBW–TV audience. Nor do we find that the amount of locally originated KSBY–TV programming presented is inconsistent with our satellite policy. As previously indicated, a satellite station, while encouraged to present local programming, is not required to do so in all situations. *1964 Multiple Ownership Rules, supra.* But, where local origination is required, the Commission does not set a minimum amount of such programming which should be presented. See, e.g., *Spanish International Communications Corporation, supra.* KSBY–TV's local originations are on the order of magnitude normally expected from a satellite station, and Gill has failed to allege specific facts to establish that the local programming offered was insufficient to serve San Luis Obispo. Petitioner has therefore failed to raise a material question for resolution at hearing concerning the programming of KSBY–TV.[6]

20. With regard to KSBY–TV's logging practices, we note that, as a satellite operation, it was proper for the KSBY–TV logs to reflect KSBW–TV originations as local, and to designate recorded programs originating from KSBW–TV as recorded. This logging practice is a result of the nature of a satellite operation, the rebroadcast of the programming of a parent station with little or no satellite origination.[7]

[5] According to its Statement on Satellite Policy, 1970–71, ARB will regard as a satellite any station which meets these requirements: *Except for news, weather, sports, editorials, and public service programming*, the programming of such satellites may differ from that of the parent (during those periods when both stations are on the air) for no more than an average of 20 quarter-hours each week. With these exceptions programming for both stations must be identical at all times. American Research Bureau, 1970–71, Satellite Policy. Nielsen applies a similar exemption of public service programming.

[6] This is not to say that we would consider KSBY–TV's local programming proposal sufficient for a station in a non-satellite mode of operation, and we fully expect that KSBY–TV's next renewal application (due to be filed no later than August 1, 1974) will reflect a program proposal responsive to the ascertained needs of San Luis Obispo and commensurate with KSBY–TV's new status.

[7] Such logging practices would not, however, be entirely proper on a non-satellite station. KSBY–TV will therefore have to devise a system whereby its program logs will differentiate between local programs rebroadcast from KSBW–TV and those originated at KSBY–TV.

21. Gill has failed to allege specific facts to establish that KSBY–TV's local news programs were not independently produced and broadcast. Petitioner did not monitor those segments or present any other tangible evidence that they are other than as represented by the licensee. Considering the facts of the KSBY–TV and KSBW–TV operation in the past, it is likely that the news programs on each station would include the same commercial announcements but remain independent in terms of content. Gill has therefore failed to raise a substantial or material question with regard to the KSBY–TV local news programs.

22. The problem with KSBY–TV's main studio was originally discovered by a Commission field inspection which revealed that according to its license, KSBY–TV's main studio was located in San Luis Obispo, but, while the licensee maintained that studio, it could not program its transmitter from it. Under our rules, a licensee must be capable of programming its transmitter from its designated main studio. Therefore, a notice of violation of Section 73.613(b) was issued. To correct the main studio location as shown on its license, KSBY–TV filed BMLCT–739 designating a studio at its transmitter site as its main studio, but promising to maintain the San Luis Obispo studio for local production. In this regard we further note that KSBY–TV holds licenses for and currently seeks renewal of two studio transmitter links (TV STL KMP–41 and TV STL KML–86), which, under these circumstances, we must conclude are presently unused.

23. Operating as a satellite with minimum local programming, KSBY–TV's studio arrangement appears satisfactory. However, KSBY–TV is no longer a satellite, and, in reviewing BMLCT–739, we find insufficient cause to justify a grant pursuant to Section 73.613(b) of our Rules. That application will therefore be retained on file pending an amendment requesting authorization for a main studio location convenient to San Luis Obispo and commensurate with all the requirements of a main studio for a non-satellite television station. Accordingly, we will not herein delete KSBY–TV's two STL authorizations, in spite of their apparent dormancy, in hopes that the licensee will activate those facilities between its transmitter site and a main studio in San Luis Obispo.

CONCLUSIONS

24. In view of the foregoing, we conclude that the various allegations of the Gill Petition to Deny and Supplement to Petition to Deny have failed to meet the standard set forth in Section 309(d) of the Communications Act of 1934, as amended, in that Gill has failed to plead specific facts sufficient to establish that a grant of the Central California Communications Corporation's applications for renewal of KSBW–TV and KSBY–TV would be *prima facie* inconsistent with the public interest. However, the various allegations of the Gill Petitions do raise other questions, which, while not sufficient to warrant a renewal hearing, do require resolution.

25. We have therefore reviewed the operating history of KSBY–TV and our satellite policy and re-evaluated that policy in the light of twenty years of satellite experience. This review has shown us that, wherever possible and particularly at renewal, satellite status should

be determined in terms of the operative considerations which led us to permit satellite operations in the first place, the ability of an area to support a non-satellite television station. Evaluating the available data on the San Luis Obispo area, we have found that the area can, and, in fact, has been supporting KSBY–TV as a non-satellite station. We have therefore indicated that KSBY–TV will no longer be considered a satellite station. In this regard we note that KSBY–TV's next regular renewal application is due to be filed on August 1, 1974, and we therefore expect that KSBY–TV's program proposals and future operation will live up to all the requirements of a non-satellite television station, and that KSBY–TV will resolve its main studio problem in a manner consistent with this new status.

26. Accordingly, IT IS ORDERED, That the "Petition to Deny" filed November 1, 1971 and the "Supplement to Petition to Deny" filed September 1, 1972 by Gill Industries ARE DENIED.

27. IT IS FURTHER ORDERED. That the applications filed by Central California Communications Corporation for renewal of licenses for KSBW–TV and KSBY–TV ARE GRANTED.

28. IT IS FURTHER ORDERED, That commencing with the next regular license period, beginning December 1, 1974, television station KSBY–TV, San Luis Obispo, California shall no longer be considered a satellite television station.

29. IT IS FURTHER ORDERED, That Central California Communications Corporation shall, on or before the expiration of the current license term on December 1, 1974, amend its application for modification of license (BMLCT–739) to provide for a main studio location in accordance with the rules and policies of the Commission.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-759

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CLARK BROADCASTING CO. (ASSIGNOR) AND WWWS RADIO CO. (ASSIGNEE) For Assignment of License of Station WWWS-FM, Saginaw, Mich.	File No. BALH-1890

MEMORANDUM OPINION AND ORDER

(Adopted July 10, 1974; Released July 19, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. We have before us: (1) the above-captioned application to assign the license of Station WWWS-FM, Saginaw, Michigan; (2) a Petition to Deny; and (3) responsive pleadings. The petitioner is WAMM, Inc., the licensee of Standard Broadcast Station WAMM, Flint, Michigan. The above-captioned application seeks permission to assign the WWWS-FM license to assignee partnership made up of one general and seven limited partners.

Petitioner's claim to standing to oppose the assignment application is based upon the contention that petitioner is in competition with the subject station and is, therefore, a party in interest. Petitioner's claim to standing is uncontested either by assignor or by assignee.

2. The Petition to Deny contends that the WWWS-FM assignment application should be denied or in the alternative designated for an evidentiary hearing for the following reasons: (1) that purchaser failed to properly ascertain the community needs; (2) that purchaser has failed to demonstrate financial ability to acquire and operate WWWS-FM; (3) that both assignor and assignee have made misrepresentations of facts to the Commission; and (4) that a premature transfer of control of WWWS-FM in violation of Section 310(b) of the Act has occurred. Petitioner's allegations in support of these reasons are set forth below.

Failure to Properly Ascertain Community Needs

3. Petitioner alleges that both assignor in its most recent renewal application and assignee in the above-captioned assignment application, have failed to ascertain the community needs in accord with the requirements set forth in the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Petitioner charges that examination of assignor's renewal application shows that only thirteen community leaders were contacted and that no explanation was given concerning the method or the results of the general public survey. Concerning assignee, petitioner

charges that despite the 1970 Census figures showing that only 23% of the Saginaw population was Black, 22 of the 40 persons interviewed by assignee in its community leader survey were Black. Thus, petitioner contends that it is assignee's desire to broadcast programming on WWWS–FM directed toward the Black community, rather than an effort to contact all the community groups revealed in the available demographic information, which determined who was to be contacted in assignee's community leader survey. The result, petitioner charges, is that an adequate representation of the views of the non-Black community has not been obtained. Finally, the Petition to Deny charges that the 65 members of the general public interviewed by assignee are not representative of the 220,000 persons in the Saginaw Standard Metropolitan Statistical Area, and that this is particularly so since no supporting data showing how they were selected or what areas of the community they represent has been submitted.

4. In response to the petition, WWWS Radio Company filed its "Opposition to Petition to Deny" hereafter referred to as the "Opposition." In the "Opposition" assignee states that assignor has corrected any defects in its original community needs ascertainment efforts by conducting new surveys and submitting the results as an amendment to the WWWS–FM renewal application. Concerning assignee's ascertainment efforts, the "Opposition" states that after conducting a demographic study of Saginaw and the surrounding area, assignee chose and interviewed 40 community leaders representing all the major segments of the community. Assignee contends that petitioner has not specified any significant community group which was not consulted. Assignee further contends that although it is true that 22 of the 40 community leaders contacted were Black, 19 of the 22 were contacted, not as leaders of Black organizations, but rather as leaders of general, non-racially related groups in the community (e.g., government officials, educators, religious leaders, businessmen, professionals, etc.). Assignee also asserts that petitioner's inferences that assignee's surveys requested information concerning program preferences rather than community problems have no merit because the application includes a summary sheet which records the responses of the community leaders as to the major problems and needs of the community. Finally, assignee contends that its general public survey, which consisted of interviews with 65 randomly selected persons in Saginaw and the surrounding area, complies with Commission requirements.

5. Petitioner also filed a "Response to Opposition to Petition to Deny", hereinafter referred to as "Response." In the "Response" petitioner argues that assignee's demographic study is totally deficient and that assignee did not contact a sufficient number of the members of the general public to assure a random sample.

6. Based upon the material before us, we conclude that petitioner has not succeeded in raising any substantial questions concerning the adequacy of either assignor's or of assignee's efforts to ascertain the community needs. We find that the assignor's new ascertainment study, filed on November 12, 1973 as an amendment to the renewal application (BRH–2544), meets the Commission's requirements and negates the criticisms of petitioner. Assignor's principals interviewed

67 community leaders, and its employees interviewed 92 members of the general public. A description of the method and of the results of the general public survey was included in assignor's amendment.

7. We also find that the assignee has made a reasonable and good faith effort to ascertain the needs and interests of the community, in accordance with the requirements of the *Primer*, supra. Assignee has submitted adequate demographic data. This data shows that the 1970 population of Saginaw was 92,000 of whom 22,000 were Black and that the 1970 population of the Saginaw Standard Metropolitan Statistical Area was 220,000 of whom 28,000 were Black. It also indicates that 41% of the working force were employed in manufacturing, 19.5% in wholesale and retail trade, 13.1% in government, and 12.5% in services. These highlights of the assignee's demographic study are sufficient to indicate that it did reasonably familiarize itself with the characteristics of the community so that it could seek out a representative cross-section of community leaders.

8. Based on its demographic study, four of assignee's principals (Ronald Brand, a limited partner; and four of the principals in assignee's general partner) personally interviewed 40 community leaders from the Saginaw Metropolitan Area and 25 community leaders from the neighboring cities of Midland and Bay City, Michigan. The forty leaders interviewed in the Saginaw area include a wide cross-section of community groups and organizations including government, business, labor, civic and service organizations, Black organizations, and women's organizations. Although a disproportionate number of Black community leaders were contacted, the Commission is unwilling to measure the quality of a broadcaster's survey strictly by the number of Blacks or of Whites interviewed. (See *RKO General, Inc., Station WHCT (TV)*, 33 FCC 2d 664, 23 RR 2d 930 (1972)). The *Primer*, supra, states that a community leader survey can be challenged by a "showing, including supporting data, that a significant group in the community has been omitted." Petitioner has not made such a showing, and those persons interviewed do represent the significant community groups as revealed by the demographic study. In addition, we find that the assignee has conducted surveys directed toward obtaining information concerning community problems and needs, not toward obtaining information concerning program preferences. In response to Section IV of the assignment application, assignee has listed the following major problems and needs as revealed by the community leader and the general community surveys. This listing includes: 1) transportation, 2) government (revenue sharing, lack of confidence in, and cooperation between governmental units), 3) crime and drugs, 4) education. We also find that assignee's survey of the general public, in which it randomly selected from the telephone directory and contacted 65 members of the general public, meets the requirements of the *Primer*, supra. The *Primer* does not require a set number of general public consultations but requires only a sufficient number of consultations with members of the general public so as to assure a generally random sample.[1]

[1] The Commission has previously accepted general community surveys in which a similar number of consultations were made, e.g., *RKO General, Inc.*, supra, where the Commission found that 100 contacts with members of the general public in Hartford, Connecticut, a city of 158,017, was in conformance with the requirements of the *Primer*.

Assignee's Financial Ability to Acquire and Operate WWWS–FM

9. To support its allegation that assignee is not financially qualified to purchase and to operate the station, petitioner charges that assignee cannot rely either upon the bank letters of credit or upon the projected revenues to be generated by the WWWS–FM operation. Petitioner contends that the submitted bank letters of credit, written to assignee's individual partners expressing a willingness to lend funds for the station purchase price, are unacceptable because the letters do not state the terms of repayment or the security to be required and because assignee's partners have not demonstrated that they have the ability to repay their respective loans. Petitioner also contends that it is unrealistic to project, based upon past financial information, that assignee's first year WWWS–FM operations will be on a break-even or a positive cash-flow basis because the assignment agreement states that there are four outstanding judgments and two pending lawsuits against assignor to recover salaries, back rent, and other costs incurred in the normal course of doing business. Petition finally charges that assignor's balance sheet shows a $36,891 entry for presold advertising and that since this amount has already been received by assignor, it will not be available to assignee in operating the station.

10. In response to the Petition to Deny, assignee in its "Opposition" asserts that the bank letters of credit do meet Commission requirements concerning repayment and security. Assignee argues that when a proposed bank loan is to be made to one of assignee's principals individually, the Commission has not required that that principal show the ability to repay the proposed loan because the principals repayment schedule will have no effect on the funds available to the assignee itself. Assignee also asserts that the submitted bank letters clearly state that as security for the loan to one of the assignee's principals the bank will require only a personal endorsement and as security for the other loans the bank letters state that the bank has been provided with evidence of the respective principal's net worth. The "Opposition" further asserts that the assignment application clearly shows that assignee need not rely upon the profitability of the WWWS–FM operations to establish its financial qualifications because assignee will have $47,355 available after paying the purchase price to meet first year operating expenses. Assignee then argues that since petitioner has not challenged the accuracy of assignee's projected $72,000 first year WWWS–FM operating expenses, assignee under the most stringent requirements need project only $25,000 in operating revenues,[2] and the Commission records show an ability to generate at least this amount of revenue. Assignee also submits an affidavit of its then General Manager, Robert Ruark, stating that in the first nine months of 1973 the station generated in excess of $70,000 in revenues.

11. Petitioner in its "Response" asserts that the only manner in which assignee's representations concerning the WWWS–FM operating revenues can be verified is for the Commission to check the cash deposits made by WWWS–FM for the first nine months of 1972.

[2] Assignee argues that $47,355 is available from the principals contributions even after the station purchase price is paid; and thus, only an additional $25,000 is necessary to cover the projected $72,000 first year operating expenses.

The "Response" also contends for the first time that the assignment application does not show whether assignee's partners are to pay the $180,000 which they have agreed to pay into assignee partnership as equity capital or as loans which must then be repaid.

12. Based upon the material before us, we conclude that petitioner has not raised substantial questions concerning assignee's financial ability to acquire and operate WWWS–FM. Assignee has shown sufficient available liquid resources to meet its first year needs and, thus, has met the financial qualifications test set forth in *Ultravision*, 1 FCC 2d 544, 5 RR 2d 343 (1965). We find that the projected first year needs total $153,000, being the sum of the $150,000 purchase price and the $3,000 grant fee, and we find that total resources available for the first year are $195,000, being the sum of the $180,000 in partner contributions and $15,000 in escrow. In addition, the FCC financial information forms for 1972 and 1973 (Confidential) both show that the station operated profitably in those years. The seven bank letters as amended which have been submitted in the application show the banks' willingness to make loans totalling $155,000 to seven of assignee's eight partners.[3] Two of these partners are to obtain $10,000 loans; one is to obtain a $15,000 loan, one a $30,000 loan, two $25,000 loans, and one a $50,000 loan. Each of these bank letters states that the loan is to be used for the sole purpose of acquiring a partnership interest in assignee partnership. Commission policy does not demand that the terms of repayment be set forth or that the ability to repay a bank loan be demonstrated where, as here, a bank letter is written to a partner individually solely to enable him to contribute capital to the partnership, rather than written to the partnership itself. This is so because the partnership need not itself repay the loan; the partner individually must do so; and, thus, the repayment of the loan has no direct effect upon partnership finances. See e.g., *KFOX, Inc.*, 5 RR 32 (1965). We further find that the bank letters do stipulate the security to be required. As security, one of the bank letters requires that the loan be personally guaranteed and the other six bank letters require no security but merely state that the partner has provided the bank with a satisfactory personal financial statement.

13. Concerning petitioner's contentions regarding the effect of the judgments and lawsuits on the projected WWWS–FM cash flow, we conclude that petitioner has not raised substantial questions concerning the reasonableness of using the 1973 FCC Form 324 financial information (Confidential) figures as a basis upon which to project the station's cash flow during the year following this transaction. The only outstanding judgment included in the application or in the pleadings is one for $20,000. Since that judgment was obtained in litigation commenced on August 1, 1971, it does not involve recovery of station operating expenses incurred in 1973, and, thus, does not affect the cash flow circumstances for that year. There is also mention in the purchase agreement of judgments in favor of BMI and of Tom Parrish and of pending actions brought by UPI and by John R. and Emma Doyle.

[3] The eighth partner submitted a personal balance sheet which shows sufficient net liquid assets to enable him to contribute $25,000 to the partnership. Thus, the $155,000 in bank loans available to the partners for the station and the $25,000 in available net liquid assets demonstrate that assignee's partners have the financial ability to contribute $180,000 to assignee partnership.

The BMI and the Tom Parrish judgments were rendered on May 18, 1973. There is no indication that those judgments were obtained to recover expenses incurred by the station in 1973.[4] In view of the fact that assignee shows $195,000 in available first year resources and $153,000 in first year expenditures [5] and in view of the substantial cash flow profits shown on the 1973 Form 324 for WWWS–FM (Confidential), we must conclude that no substantial questions exist concerning the financial qualifications of the assignee.

14. We reject petitioner's charge that the $36,891 entry for presold advertising has already been received by assignor and, thus, will be unavailable to assignee despite the fact that assignee must provide the advertising time. On this point it is enough to note that the purchase agreement itself provides in paragraph 15 that "[p]urchaser shall be entitled to payments for all advertising aired from the date of closing thereafter." With regard to the question raised in petitioner's reply pleading as to whether the partner's contributions will be in the form of loans or of equity capital, the Limited Partnership Agreement submitted as a part of the application provides in Section 2.1 as follows: ". . . beginning capital of the Partnership shall be the cash contributed by the partners as set forth in Schedule A hereto. . . ." The schedule attached to the agreement is signed by each of the partners, and it states: "We agree to pay into the company upon demand of its general partner . . . the amount set opposite our names." The sum of the partners' contributions as set forth in Schedule A is $180,000, the amount upon which assignee relies to meet its first year needs. Based upon these considerations, we conclude that the $180,000, which the partners have agreed to contribute is equity capital, not a loan.

Misrepresentations of Facts to the Commission

15. Petitioner alleges that assignee has misrepresented to the Commission the manner in which it intends to operate WWWS–FM and that assignor has misrepresented to the Commission that it serves Saginaw, the city of license, when in fact it attempts to serve Flint, Michigan, a city 40 miles away. The Petition to Deny states that although assignee specifically states its intent to program WWWS–FM to serve the Bay City-Midland-Saginaw market, it is petitioner's contention that assignee intends to program for the Flint market and to sell advertising as if it were a Flint radio station. In further support of this assertion, petitioner charges that it is its "understanding and belief" that representations on behalf of assignee have been made to Detroit advertising agencies stating that assignee intends to operate WWWS–FM so as to "take over the Flint market and knock WAMM out of business." To support its allegations concerning assignor, petitioner charges that during the week of October 1, 1973 WWWS–FM carried 196 commercial messages from Flint business establishments which for the most part sell exclusively in the Flint area.

16. Assignee with its "Opposition" submits an affidavit of Frank P. Lloyd, the President of assignee's General Partner, in which he

[4] There is no information in any of the pleadings or in the assignment application itself concerning the dollar amount of the BMI or Tom Parrish judgments or of the pending actions.

[5] Assignee's application shows partnership resources of $180,000 in contributions receivable from its partners and of $15,000 presently in escrow and shows expenses of a $150,000 station purchase price and of a $3,000 Commission grant fee.

states "all station WWWS–FM programming will be designed to serve the needs and interests of Saginaw and the surrounding area." The affidavit denies petitioner's allegation that assignee's real intent is to serve the Flint market. Concerning petitioner's charges that certain representations have been made on behalf of assignee to Detroit advertisers, the "Opposition" contends that petitioner has not identified the agency to whom the representations were made nor the person who made the representations[6] and that no affidavit of anyone with personal knowledge of the representations has been submitted as is required by Section 309(d) of the Communications Act. Concerning petitioner's charges that assignor has been serving the Flint, not the Saginaw, market, the "Opposition" contends that petitioner has neither identified those persons to whom assignor has represented that it serves Flint nor submitted an affidavit in support of this allegation as is required by Section 309(d) of the Communications Act.

17. The "Response" filed by petitioner is accompanied by an affidavit of petitioner's President, Neal Mason, which states "it was reported to me from a Detroit source that a representative of the purchaser of WWWS–FM acknowledged that the purchaser intends to take over the Flint market and put WAMM out of business." That same affidavit states further concerning assignor ". . . I personally have heard WWWS–FM as an integral part of their format continually broadcast announcements stating that WWWS–FM is the Soul Station of Tri-Cities serving Flint, Saginaw, and Bay City . . . ," and petitioner charges that this raises questions as to whether or not assignor is conforming to Commission station identification requirements.

18. In response to petitioner's charges concerning assignor's station identification, assignor's Vice President, Mr. Glen L. Moore, stated in a letter to the Commission that petitioner's charge that WWWS–FM identifies itself as a Flint-Saginaw station is false.[7]

19. Based upon all of the material before us, we conclude that petitioner has not succeeded in raising any substantial questions concerning misrepresentations of fact made to the Commission by either assignor or assignee. Petitioner's allegations which state that, although Station WWWS–FM is licensed to Saginaw, assignee intends to serve and assignor has served Flint have not been supported by an "affidavit of a person or persons with personal knowledge thereof" as is required by Section 309(d)(1) of the Communications Act. Concerning assignee, petitioner's mere statement that it is its "understanding and belief" and petitioner's very general affidavit which reports merely hearsay statements regarding representations made in Detroit are not sufficient to support petitioner's allegation. In view of assignee's explicit representations that it intends to serve Saginaw and its surrounding communities, a designation for hearing on the issue of which community assignee in fact intends to serve is inappropriate. Such a

[6] The Lloyd affidavit also states that under assignee's partnership agreement only the general partner, Frank Lloyd & Associates, Inc., has authority to act for the partnership.

[7] This letter and enclosed affidavit were not filed with the Commission as a formal pleading as defined by Section 1.580 of the Commission's Rules. However, since petitioner raised the question concerning the WWWS–FM station identification for the first time in its "Response to Opposition to Petition to Deny," it is appropriate to consider assignor's filing as a response to an informal objection under 1.587 of the Rules.

hearing would deprive the assignee of the opportunity to demonstrate its good faith. See e.g., *Progress Radio Network, Inc.*, 38 FCC 2d 1019, 25 RR 2d 805, 810 (1972): c.f., *Brandywine Main Line Radio, Inc.*, 4 RR 2d 697, 700, 702 (1965). Concerning assignor, petitioner's charge that considerable advertising from Flint merchants has been carried on WWWS–FM does not alone, even if true, violate any Commission rule or policy.

20. In view of the proximity of Flint and Saginaw (approximately 30 air miles apart), and of the fact that Flint is a much larger city with a greater number and variety of retail establishments and commercial services, it is not unreasonable that WWWS–FM would solicit advertising from Flint and that Flint merchants would advertise on WWWS–FM. However, this does not in any way support petitioner's contention that assignee misrepresented to the Commission by stating that "[t]he station will principally serve the city of Saginaw, Michigan and surrounding communities." Assignee's survey was principally designed to discover the needs of Saginaw and its environs, and assignee has proposed programming to meet the needs discovered. There has been no showing that the WWWS–FM musical format is not reasonably attuned to the tastes of its city of license. Accordingly, we find no substantial question regarding the truthfulness of assignee's representations or whether it intends to program WWWS–FM as a Flint station in derogation of its primary obligation to serve Saginaw, its city of license.

21. Finally, we do not find that assignor has violated Commission policy in the matter of station identification.[8] Petitioner's affidavit is not precise in stating the actual language used in the WWWS–FM station identification announcements whereas assignee in its response sets forth the specific language used in the WWWS–FM announcements. That specific language complies with the requirements of Section 73.1201 of the Commission's Rules and complies exactly with one of the examples set forth in *Public Notice-Examples of Rules Regarding Broadcast of Statements Regarding Station's Licensed Location*, 10 FCC 2d 407 (1967).

Premature Transfer of Control of WWWS–FM

22. The Petition to Deny alleges that it is petitioner's "understanding and belief" that WWWS–FM is presently being operated under the mandate of assignee in direct violation of Section 310(b) of the Communications Act.[9] To support this allegation, petitioner charges: (a) that two WWWS–FM announcers "inferred" in conversations with petitioner that their wages are being guaranteed [10] (petitioner argues that assignor's shaky financial operation makes such guarantee impossible; and, therefore, assignee is the guarantor); (b) that these

[8] Section 73.1201 of the Commission's Rules sets forth the requirements in the matter of station identification.

[9] Section 310(b) of the Act states: "No . . . license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby."

[10] Petitioner alleges that these two announcers had previously been employed by Station WWWS–FM but had come to work for petitioner when WWWS–FM was not paying their salaries, and then 10 days before the petition was submitted they had left petitioner to return to WWWS–FM.

same two announcers "were of the impression that a filing had taken place at the FCC and the station had changed hands"; and (c) that the WWWS–FM general manager while attempting to get petitioner's sales manager to come to work for station WWWS–FM, stated that a prepayment of salary would be no problem because the money would come from assignee.

23. Assignee's "Opposition" asserts that petitioner's recounting of impressions and of inferences does not constitute the "specific allegations of fact" required by Section 309(d) of the Communications Act and that petitioner has not submitted an affidavit to support the alleged statement by the WWWS–FM general manager. In addition, assignee submits with the "Opposition" an affidavit of its President and General Partner, Frank P. Lloyd, stating that he has never guaranteed nor authorized payment of wages to any former, present, or prospective WWWS–FM employee and that assignee has provided no funds to WWWS–FM.[11] Assignee also submits with the "Opposition" an affidavit of the then WWWS–FM General Manager, Robert Ruark, stating that neither assignee nor anyone associated with assignee has either provided or agreed to provide any funds to WWWS–FM for employees or for any other purpose.

24. Petitioner further contends in its "Response" that assignor's inability to meet its payroll and other operating expenses is substantiated by assignor's own documents as to outstanding judgments and pending litigation and yet that, following execution of the WWWS–FM sales agreement, assignor hired back two ex-announcers, hired two new salespeople, and hired a new program director. The "Response" argues that these employees would not leave employment to join a station presently being sold because it is losing money unless certain guarantees were made by the prospective assignee. Finally, an affidavit of petitioner's sales manager, Norman McCarthy, was submitted relating the details of the conversation mentioned in the petition in which Mr. Ruark, the WWWS–FM general manager, states that should McCarthy come to work for WWWS–FM the money for his salary would come from assignee.

25. Based upon the evidence before us, we conclude that petitioner has not succeeded in raising substantial questions concerning an unauthorized transfer of control over Station WWWS–FM. We find that petitioner's "understanding and belief" that assignee has prematurely assumed control of the station has not been supported by an affidavit of any person with personal knowledge of the facts involved. Such affidavit is required by Section 309(d)(1) of the Communications Act.[12] Petitioner's recollections of its conversations with two present WWWS–FM announcers in which the announcers allegedly "inferred that their wages were being guaranteed" and in which they also stated that they "were of the impression that a filing had taken place at the FCC and the station had changed hands" do not comply

[11] The affidavit further states that assignee partnership has no funds that could be provided to WWWS–FM because all funds presently collected remain in escrow, and no further funds will be collected until Commission consent to assign is granted.

[12] Section 309(d)(1) of the Communications Act states:
"Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."

with the statutory requirement that a petitioner's allegations must be supported by an affidavit of a person with personal knowledge. In addition, we also find that, in light of assignee's pleadings, the affidavit of petitioner's Sales Manager, Norman McCarthy, does not adequately support petitioner's unauthorized transfer allegation. Mr. McCarthy in that affidavit states that he was told by a "Mr. Howard Ruark of WWWS–FM" [13] that should he leave petitioner's station and join WWWS–FM his salary would be guaranteed by assignee. In view of the affidavits of assignee's general partner, Frank P. Lloyd, and of Robert Ruark,[13] as described above, and in view of the additional fact that no evidence has been submitted to show that Ruark is authorized to speak for assignee, we conclude that the McCarthy affidavit does not merit a finding that a substantial question of an unauthorized transfer has been raised. Finally, although we agree that it may be quite unusual for persons to leave steady employment and join a broadcast station in the process of being sold unless certain guarantees have been made by the prospective assignee, we do not find this allegation alone sufficient to support petitioner's allegation that an unauthorized transfer has occurred.

26. In view of the above, we conclude that the petition raises no substantial and material questions of fact as to whether or not (a) community needs were properly ascertained, (b) assignee has demonstrated the financial ability to acquire and operate WWWS–FM, (c) assignor or assignee have made misrepresentations to the Commission, and (d) a premature transfer of control of WWWS–FM has occurred. Accordingly, upon determining that the applicants are fully qualified and that the public interest, convenience and necessity will be served thereby, it is ORDERED, that the Petition to Deny, filed by WAMM, Inc. IS DENIED and the application for assignment of the license of Radio Station WWWS–FM, Saginaw, Michigan, from Clark Broadcasting Company to WWWS Radio Company, **IS GRANTED.**

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[13] The application and assignee's pleadings all indicate that Ruark's first name is Robert, not Howard.

FCC 74-771

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 31 (UNIFORM SYSTEM OF ACCOUNTS FOR CLASS A AND CLASS B TELEPHONE COMPANIES) TO INCREASE THE MONETARY LIMIT WHERE CAPITALIZATION IS APPROPRIATE FROM $25 TO $50	Docket No. 20110 (RM-2338)

NOTICE OF PROPOSED RULEMAKING

(Adopted July 16, 1974; Released July 24, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. Notice of Proposed Rule Making is hereby given in the above-entitled matter.

2. In a petition dated March 4, 1974, filed by the American Telephone and Telegraph Company (AT&T) on behalf of itself and its associated operating telephone companies, the Commission was requested to amend its system of accounts for Class A and Class B telephone companies (Part 31), effective January 1, 1975, to increase from $25 to $50 the cost of individual items of equipment that shall be charged to an appropriate operating expense or clearing account according to the use of such items rather than to a plant account. In this regard AT&T proposes that the text of Section 31.2-20(d) be amended to read as follows:

> (d) The cost of individual items of equipment, such as tools and office equipment, of small value (for example, costing $50 or less) or short life, shall be charged to the appropriate operating expense or clearing accounts according to the use of such items, except that such accounting shall not be permitted when the investment in such property is relatively large and the correctness of the accounting therefor is verified by current inventories.

3. On March 26, 1974, pursuant to the provisions of Section 1.403 of Part 1 of the Commission's Rules, Public Notice was given in Report No. 902 of the fact that a petition for rule making had been filed by AT&T with the Commission on March 7, 1974. In the Public Notice it was pointed out that interested persons had thirty days from the date of the Notice within which to file comments either supporting or opposing the petition. No timely comments were received. Late comments dated May 7, 1974, were submitted, however, by GTE Service Corporation (GTE) on behalf of its affiliated telephone operating companies expressing basic agreement with respect to raising the monetary limits for capitalization but proposing to increase the limit from $25 to $100. GTE's suggestion is of a general nature and without

specific supporting data for the use of a $100 limit rather than a $50 limit. Therefore, we are proceeding in this Notice with the $50 proposal recommended by AT&T in its petition of March 4, 1974.

4. In support of its request, AT&T refers to the continued increases in price levels that have occurred since January 1, 1957, when the monetary limit was raised from $10 to $25, as well as the probability of future inflation. In this regard, AT&T states that the Wholesale Price Index for hand tools and commercial furniture has increased 75.9% and 55.5%, respectively, since 1957. AT&T further states that the proposed increase in the capitalization limit would provide some relief from the growing record keeping and inventory burdens which are presently involved in cases of items of relatively minor value.

5. AT&T proposes that the change in the rules be applied only to items purchased in 1975 and thereafter. Such a change AT&T states will increase expenses in the Bell System by approximately $5 million annually before taxes. Under AT&T's proposal items presently capitalized which cost in excess of $25 but not in excess of $50 will remain capitalized and continue to be written off through depreciation charges. It is AT&T's position that inasmuch as the purchasing power of the dollar has decreased substantially since 1957, especially in the last several years, it would be inappropriate to retroactively charge to expense the undepreciated investment remaining in plant at December 31, 1974 for items capitalized under the $25 limit. AT&T states that such a retroactive charge would imply that the previously stated $25 limit was too low and that prior years' expenses were, therefore, understated whereas AT&T intends only to recognize that inflation has eroded purchasing power and that for the future a $50 limit is consistent with the purpose for which the previously appropriate $25 limit was established in 1957. Further in this regard, it should be pointed out that many items intended to be relieved of the capitalization requirement under our 1956 Order, and as such initially were charged to expense thereunder, have at varying times during the period since 1957 been required again to be capitalized solely because of an increase in the cost of such items. Information furnished to us informally by AT&T indicates that as of December 31, 1972 the plant accounts of the Bell System telephone companies included an estimated investment of $102.0 million in items costing more than $25 but not over $50.

6. The Commission proposes to make any amendments to Part 31 of our Rules adopted as a result of this proceeding effective not less than six months after issuance of a final order with respect to this docket as required by Section 220(g) of the Communications Act with the option that those carriers which desire to do so may place the amendment in effect at an earlier date, including retroactive to January 1, 1975. The amendment proposed herein is set forth in the attached Appendix.

7. Although no amendments are proposed herein for our systems of accounts for Class C telephone companies, for radiotelegraph carriers, and for wire-telegraph and ocean-cable carriers, which are Parts 33, 34 and 35 of our Rules, respectively, comments are solicited from carriers subject to these parts of our Rules and from other interested parties in order to determine if amendments thereto in the same man-

ner as proposed for Part 31 should be made. At present, items costing $10 or less are to be charged to an appropriate expense account under the provisions of these parts of our Rules. Any comments submitted by subject carriers should contain a statement of the estimated effect on annual expenses that would occur because of such a change, together with a statement by plant account of the estimated amount of investment recorded therein as of December 31, 1973 for items costing over $10 but not more than $50.

8. This Notice of Proposed Rule Making is issued under authority contained in sections 4(i) and 220 of the Communications Act of 1934, 47 U.S.C. 154(i) and 220.

9. Pursuant to applicable procedures set forth in 47 CFR 1.415 interested persons may file comments on or before August 30, 1974, and reply comments on or before September 11, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. On reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the specific comments invited by this Notice. Comments in response to this Notice will be available for inspection in the Commission's Broadcast and Dockets Reference Room.

10. Pursuant to applicable procedures set forth in 47 CFR 1.419, an original and fourteen copies of all statements or briefs shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 31—Uniform System of Accounts for Class A and Class B Telephone Companies is amended as follows:

In § 31.2-20 paragraph (d) is amended to read as follows:

§ 31.2-20 PURPOSE OF TELEPHONE PLANT ACCOUNTS

* * * * * * *

(d) The cost of individual items of equipment, such as tools and office equipment of small value (for example, costing $50 or less) or short life, shall be charged to the appropriate operating expense or clearing accounts according to the use of such items, except that such accounting shall not be permitted when the investment in such property is relatively large and the correctness of the accounting therefor is verified by current inventories.

109-004—74——5

FCC 74-804

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVISION OF OPERATING RULES FOR CLASS D STATIONS IN THE CITIZENS RADIO SERVICE	Docket No. 20120 RM-1508, 1592, 1733, 1751, 1905, 1991, 2053, 2084, 2132, 2300, 2317, 2318, 1841[1]

NOTICE OF PROPOSED RULEMAKING

(Adopted July 23, 1974; Released July 31, 1974)

BY THE COMMISSION:

1. Notice of Proposed Rule Making in the above captioned matter is hereby given.

2. The following petitions, which are briefly summarized, will be considered in this proceeding:

RM-1508 Eliminate the restrictions placed on the use of Class D stations by § 95.41(d)(1). Filed by Michigan CB Council, September 8, 1969.

RM-1592 Prohibit use of any ten code, amend § 95.97; require a station log; amend § 95.85. Filed by Robert J. C. Murray, March 30, 1970.

RM-1733 Amend § 95.41(d)(3) to allow associations in certain instances to operate on Channel 9; amend § 95.85 to make it conform to § 95.41(d)(3) as amended. Filed by the Pennsylvania League of Emergency Associations, January 6, 1971.

RM-1751 Amend § 95.41(d) to allow inter station operation on all channels; amend § 95.91 to eliminate five minute restriction. Filed by Trenton ALERT, Inc., February 18, 1971.

RM-1905 Amend § 95.41(d)(3) to allow the use of an emergency locator beacon on a Class D station. Filed by Aero Electronics Development Company, Inc., November 29, 1971.

RM-1991 Amend § 95.83(a)(1). Filed by the United States Citizens Radio Council, Inc., June 9, 1972.

RM-2053 Create a hobby class; amend §§ 95.37, 95.41, 95.83, 95.91; permit Class D licensees to use frequencies immediately above 27.230 MHz for business purposes only. Filed by Hercules Radio and Recording Studio, September 8, 1972.

RM-2084 Allocate channels 16, 17, 18 for single sideband emissions only between units of different stations. Filed by the United States Citizens Radio Council, Inc., November 13, 1972.

[1] RM-1841. Filed by the United CB'ers of America on July 1, 1971. To the extent subject matter of this petition is not considered in Docket No. 19759, it will be considered in this proceeding.

RM–2132 Amend § 95.41 to permit the use of Channel 9 as a calling channel. Filed by the Illinois State Citizens Band Radio Association, Inc., February 1, 1973.

RM–2300 Allocate Channel 15 for moving vehicles. Filed by Highway Assistance Modulators, December 17, 1973.

RM–2317 Amend §§ 95.41(d) and 95.95. Filed by the United States Citizens Radio Council, Inc., February 12, 1974.

RM–2318 Allocate additional channels for the use of Class D stations. Filed by the United States Citizens Radio Council, Inc., February 12, 1974.

3. It is the Commission's purpose in this proceeding to carefully examine and evaluate all of the rules contained in Part 95 as they pertain to operating requirements for Class D stations. Our view is to eliminate unnecessary rules, to simplify others, and to reinforce and improve the basic structure of the service so that it will meet the intended purpose of a two-way radio communication service for individual United States Citizens. We expect that our proposed rule amendments will enhance the potential of the Citizens Radio Service to provide adequate and efficient radio communications provided licensees comply, on a voluntary basis, with our Rules. Some of the criteria we are applying in this reexamination are as follows: the communications requirements of present and future Class D licensees, the frequency spectrum available to meet present and future needs, the Commission's ability to regulate the Citizens Radio Service in the public interest, the Commission's ability to adequately enforce its regulations, and the ability of licensees and others involved with the Citizens Radio Service to use the Service in a mature, responsible manner. These criteria are not meant to be all inclusive and other considerations may be added by the Commission after reviewing both the comments received in response hereto and other material.

4. We are proposing the following major rule amendments. First, we will allocate additional frequencies to Class D stations. Second, we propose the establishment of a calling channel. Third, we intend to encourage the use of single side band emissions by setting aside exclusive channels. Fourth, the prohibited communications section will be revised primarily to simplify its language; a new section will be added to delineate what communications are permitted as opposed to the present rules which have stated only what is not allowed. Fifth, we propose to simplify the identification procedure. Sixth, we are proposing rules on acceptance of antennas and amending the technical rules relating thereto.

EXPANSION OF FREQUENCY AND CHANNELS

5. The proposed rules herein will approximately double the band space available to Class D stations. Specifically, we proposed to allocate the band 27.230 MHz to 27.540 MHz to Class D use which should alleviate congestion in the present Class D band. The present frequencies between 26.960 MHz and 27.230 MHz be expanded to 27.310 MHz and channelled with 10 kHz spacing. The frequencies between 27.310 MHz and 27.505 will be channelled at 5 kHz and their use will be

restricted to single sideband suppressed carrier emission only. A total of 70 channels will then be immediately available for use by Class D stations.

6. Five years following the adoption of final rules in this proceeding, we propose to require all Class D transmitters to operate with only single sideband emissions, see paragraph 18 below, and thus we will split the channels between 26.960 and 27.310 to 5 kHz. That action will then make an additional 30 channels available to Class D stations.

7. Our present proposal will maintain the dichotomy of the intra-inter station channels but with an expanded number of inter station channels. Upon adoption of final rules there will be 30 channels available for inter station use. While all Class D channels may be used for intra station communications 40 channels, channels 60 through 99, will be limited to such use only.

8. The Commission takes specific notice of the criticism by Class D licensees both formally expressed in petitions for rule making and informally by numerous letters of this inter-intra station concept and we request specific comments as to whether the concept, as specified above, should be continued or how it should be modified. Comments should take into account the long standing reason that the intra-inter channel concept is designed to protect communications between units of the same station.

9. Stations now licensed (in services other than Citizens) for the use of frequencies between 27.230 MHz and 27.540 MHz will be permitted to continue their operations under the terms and conditions of their license for the balance of their license term. Under our proposal they will not be required to modify their equipment or their operations during their license term. They will not, however, be afforded protection from any licensed Class D station properly operating between 27.230 MHz and 27.540 MHz. Present licenses for these frequencies will be renewed or modified in accordance with § 95.42(b) and (c) as proposed herein.

10. In regard to the immediately foregoing provisions, we request comments from affected parties on the following:

1. Will these provisions provide reasonable protection to stations licensed pursuant to Parts 89, 91, 93?
2. Will there be significant mutual interference between licensees operating under Parts 89, 91, 93 and Class D licensees?
3. Is there a valid need for renewal provisions?
4. What other specific plans could be implemented for phasing out Part 89, 91, 93 licensees from this band?

ANTENNAS

11. The rules proposed herein will also amend § 95.37(c) so as to make the restrictions on antenna heights applicable to both transmitting as well as receiving antennas. In the past, a number of licensees have erected antennas which exceed our height limitations and then claim those antennas were only used for receiving purposes. Such a practice, in our view, in almost every instance is clearly a fraudulent one on the part of the licensee. However, with the increased height permitted by our action in Docket 19798, this problem may become

severely aggravated if licensees continue to erect two antennas, one being considerably higher than permitted. The antenna height limitations are set to assure that antennas will not constitute hazards to aircraft. As the permissible antenna height is increased to sixty feet, observance of our rules becomes critical. Accordingly, we find that it is in the public interest to include receiving antennas in the parameters of our Class D station antenna rule.

12. We are also proposing to amend our equipment authorization rules in Subpart J of Part 2, our marketing rules in Subpart I of Part 2, and Part 95 (as those rules concern Class D stations in the Citizens Radio Service), to provide a procedure by which the Commission may issue approval of antennas used at Class D stations. The proposed Part 95 amendments are shown in the attached Appendix. Part 2 will be amended to provide for a procedure termed antenna acceptance, at such time as the Part 95 requirements are adopted. Antenna acceptance would be required before any antenna could be used at a Class D station. Continued use of antennas now installed at Class D stations would be permitted.

13. We intend to require the filing of vertical and horizontal radiation patterns by the antenna manufacturer to assist us in determining whether the antenna meets the omnidirectional directivity requirements established in Docket Number 19798. We also intend to establish technical parameters for directional antennas used at Class D stations and we are considering placing specific limits on power-handling capability. Specific comments concerning methods of implementing such a requirement and its feasibility are invited. We also invite comments as to what additional technical parameters, if any, should be adopted. Part 95 of our rules will be amended to set forth specific technical requirements that antennas to be used at Class D stations must meet. The data required will include showings on horizontal and vertical radiation patterns and maximum and minimum limits for directivity.

14. Our regulation of antennas is directed to efficient spectrum management. Such management includes recognition of the parameters affecting co-channel interference. By specifying such technical parameters for antennas we believe that in a very direct way we will improve the effectiveness, usefulness and efficiency of the Class D Citizens Radio Service. Additionally, we believe that these rules will bring some degree of assurance to the licensee that the antenna he purchases will meet certain minimum technical requirements.

15. The procedure being proposed is different from any of the present equipment authorized procedures of the Commission. However, the antenna acceptance procedure will be similar to the present transmitter type acceptance procedure inasmuch as the antenna manufacturer will be required to submit measurement data for evaluation by the Commission. If the data show that pertinent technical requirements are met, antenna acceptance would be granted. Although the antenna acceptance is being initiated for antennas used at Class D stations in the Citizens Radio Service; we intend this to be the initial step in the start of a program for acceptance of antennas used in other radio services.

16. The manufacturers of antennas to be marketed for use at Class D stations will be required to apply for and receive antenna acceptance before such antennas may be marketed. Antennas on the market at the time final rules are adopted will be allowed one year in which to meet the technical requirements adopted and to obtain the required acceptance.

CALLING CHANNEL

17. Channel 11, 27.085 MHz, under our proposed rules will be set aside for exclusive use as a calling channel. The use of that channel will be limited to establishing communications. Once contact with the unit being called is established, substantive communications will be required to take place on an appropriate working channel. Our basic objective in establishing a calling channel is to provide the means by which licensees can themselves establish an efficient and orderly operating and calling procedure. At this time we are only proposing the allocation of one channel for calling purposes. We believe that a one channel national calling system, as opposed to a several channel regional calling system, will be easier to administer and will prove to be more efficient from the licensees point of view. We are, however, prepared to reevaluate our position should the comments indicate that additional calling channels are needed or that some channel other than Channel 11 would be better suited for calling purposes.

SINGLE SIDE BAND EMISSIONS

18. The Commission believes that the use of single side band (SSB) emissions will greatly increase the efficiency and usefulness of Class D stations. Interference levels are significantly reduced by the use of SSB emissions as compared to double side band. More importantly, since a single side band emission uses approximately one-half of the frequency space a double side band emission does the number of useable channels doubles. To encourage the use of SSB, we intend to reserve Channels 60 through 99, 27.310 MHz to 27.505 MHz, for SSB suppressed carrier use only. Double side band emissions will be allowed to continue on Channels 1–30 for a period of five years from the date final rules are adopted. After that date the use of double side band emissions by Class D stations must cease. We request specific comments on the viability and feasibility of this proposal as well as the economic impact, if any, upon present and future licensees.

PERMISSIBLE COMMUNICATIONS

19. The Commission is well aware of the rule making petitions as well as the sentiment of some users of Class D stations, licensed and unlicensed, to change the present limits of permissible communications. Several of the rule making petitions herein under consideration request that hobby type communications be legitimized. We are of the opinion that § 95.83(a) is difficult for some licensees to understand and apply in actual day to day operations. The rule should be revised and simplified, but the basic concept of the Citizens Radio Service should not be changed. The Service was intended to provide

U.S. citizens, with two-way radio facilities to coordinate and facilitate their personal or business affairs. The Service was not intended for those people who wish to operate a radio transmitter simply for the purpose of operating a radio, nor was it intended for the person who wishes simply to pass the time of day. We do not intend to legitimize those activities. We do, however, intend to delete several subsections of § 95.83(a) dealing with hobby type activities and to add a new § 95.81 which will read, in part, that all communications must relate to the activities of the licensee. Under the provisions of this rule any communication related to the furtherance of a legitimate activity will be permitted. The only restrictions associated with this rule is that the activity itself must not relate to the use of radio and the activity must not be specifically prohibited in § 95.83(a), e.g., the playing of music. In connection with the foregoing we also propose to delete at the earliest opportunity that item on the application from (FCC Form 505) which requires the applicant to certify that he will not use his station for idle conversation or chit-chat.

20. Under our proposed rules a maximum limitation on the duration of transmission will be continued. Interstation operations will be restricted to a maximum of five continuous minutes; intra-station transmissions will be limited to the minimum practicable transmission time. Exceptions for emergency communications will be continued. We are, however, shortening the silent period, which is now five minutes to one minute. It is the Commission's view that some time limitations are needed in order to prevent stations from needlessly transmitting for unnecessarily long periods of time. Particularly in view of the fact that the content of the communication will not, under the proposed rules, be as restrictive as in the past. We believe that licensees will find this rule provision beneficial to their efficient operations.

21. Our proposed rules will delete § 95.83(a)(14) pertaining to the relaying of messages by licensees. We are aware of the view that this section has prohibited the relaying of, on infrequent occasions, some communications, e.g., communications intended to be between two units of the same station but which because of atmospheric conditions cannot be completed without a third party relaying the message, and has limited the efficiency and usefulness of the Class D service. On the other hand, we are particularly concerned that by removing this prohibition entirely, we may encourage unnecessary and perhaps wholesale relaying of messages, which is not our intention. Comments from knowledgeable parties are requested as to whether this provision should be deleted in its entirety or whether and how it should be modified.

22. Comments are also solicited as to whether it is advisable to reduce the present age requirement for licensing from 18 years of age to 16 years.

STATION IDENTIFICATION

23. Station identification is being radically simplified. Under our proposals, a transmitting station will be required to identify his transmissions by simply stating his own call sign at the beginning and end of the transmission. We will no longer require a transmitting station to give both his own call and the call sign of the station with

which communications are being conducted. In simplifying this rule it is our intention to make it easy for the licensee to identify his transmissions with his call sign. The simplification of this rule does, however, create some potential enforcement difficulties if licensees do not voluntarily comply with it by identifying each and every transmission. Should full cooperation not result from this rule change, licensees may reasonably expect the Commission to reimpose the present rule. Stringent enforcement of this rule can be expected.

24. The specific rule changes proposed herein are set forth in the attached Appendix. Authority for these proposed amendments is contained in §§ 4(i) and 303 of the Communications Act of 1934, as amended.

25. Pursuant to applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before January 30, 1975, and reply comments on or before February 15, 1975. In accordance with the provisions of § 1.419(b) of the Commission's Rules, an original and fourteen copies of all statements, briefs, and comments filed shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken. The Commission may also take into account other relevant information before it, in addition to specific comments invited by this Notice. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Chapter 1, Parts 2, 89, 91, 93, and 95 of Title 47 of the Code of Federal regulations is amended as follows:

1. Part 2, Section 2.106 is amended as follows:

§ 2.106 TABLE OF FREQUENCY ALLOCATIONS.

United States		Federal Communications Commission					
Band (MHz)	Allocation	Band (MHz)	Service	Class of station	Frequency (MHz)	Nature	Of services of station
5	6	7	8	9	10	11	
*	*	*	*	*	*	*	*
26.95-27.54	NG (US81) (225)	26.95-26.96	Fixed	Fixed	26.955	International fixed public citizens.	
		26.96-27.54	Land mobile	Land mobile	27.12	Industrial, scientific, and medical equipment.	

2. Part 89 is amended to delete Section 89.101(d) and to mark that section as reserved.

3. In Part 91, Sections 91.254, 91.304, 91.354, 91.404, 91.454, 91.504, 91.554, 91.730 and 91.754 are amended to delete the following frequencies: 27.235 MHz, 27.245 MHz, 27.265 MHz, 27.275 MHz.

4. In Part 93, Sections 93.254, 93.356, 93.404, and 93.504 are amended to delete the following frequencies: 27.235 MHz, 27.245 MHz, 27.265 MHz, 27.275 MHz.

5. In Part 91, Section 91.504 is amended to delete the following frequencies: 27.290 MHz, 27.310 MHz, 27.330 MHz, 27.350 MHz, 27.370 MHz.

6. In Part 91, Section 91.554 is amended to delete the following frequencies: 27.390 MHz, 27.410 MHz, 27.430 MHz, 27.450 MHz, 27.470 MHz, 27.490 MHz, 27.510 MHz, 27.530 MHz,

7. In § 95.3(b) the definition "Class D Station" is amended to read as follows:

§ 95.3 DEFINITIONS.

(b) * * *

Class D station. A station in the Citizens Radio Service licensed to be operated for radiotelephony only, on an authorized frequency in the 26.96–27.54 MHz band.

* * * * * * *

8. Section 95.37(c) and (c)(3) are amended to read as follows:

§ 95.37 LIMITATIONS ON ANTENNA STRUCTURES.

* * * * * * *

(c) All antennas employed at or in any manner associated with a Class C or Class D station operated at a fixed location shall comply with at least one of the following:

* * * * * * *

(3) The antenna is mounted in the transmitting antenna structure of another authorized radio station and exceeds neither 60 feet above ground level nor the height of the antenna supporting structure of the other station; or

* * * * * * *

9. Section 95.41(d)(1) & (2) are amended, and par. (d)(4) added to read as follows:

§ 95.41 FREQUENCIES AVAILABLE.

* * * * * * *

(d) The frequencies, which are commonly designated as channels, listed in the following tables are available for use by Class D stations employing radiotelephony only, on a shared basis with other stations in the Citizens Radio Service, and subject to no protection from interference due to the operation of industrial, scientific, or medical devices within the 26.96–27.28 MHz band.

(1) The following frequencies may be used for communications between units of the same or different stations with either a single sideband or double sideband amplitude modulated emission (See 95.47(d)):

MHz:	*Channel*	MHz:	*Channel*
26.965	1	27.165	17
26.975	2	27.175	18
26.985	3	27.185	19
27.005	4	27.205	20
27.015	5	27.215	21
27.025	6	27.225	22
27.035	7	27.255	23
27.055	8	27.235	24
27.075	10	27.245	25
27.105	12	27.265	26
27.115	13	27.275	27
27.125	14	27.285	28
27.135	15	27.295	29
27.155	16	27.305	30

(2) The following frequencies may only be used for communications between units of the same station with only A3J emission.

MHz:	Channel	MHz:	Channel
27.310	60	27.410	80
27.315	61	27.415	81
27.320	62	27.420	82
27.325	63	27.425	83
27.330	64	27.430	84
27.335	65	27.435	85
27.340	66	27.440	86
27.345	67	27.445	87
27.350	68	27.450	88
27.355	69	27.455	89
27.360	70	27.460	90
27.365	71	27.465	91
27.370	72	27.470	92
27.375	73	27.475	93
27.380	74	27.480	94
27.385	75	27.485	95
27.390	76	27.490	96
27.395	77	27.495	97
27.400	78	27.500	98
27.405	79	27.505	99

* * * * * * *

(4) The frequency 27.085 MHz (Channel 11) shall be used only as a calling channel for the sole purpose of establishing communications and moving to another frequency (channel) to conduct communications.

10. A new Section 95.42 is added to read as follows:

§ 95.42 Special Provisions.

(a) Any license granted under provisions of this chapter prior to (the adoption date of final rules), which authorized the use of a frequency between 27.230 and 27.540 MHz, shall remain valid for the balance of the license term pursuant to the applicable rules, provisions and requirements in effect on (the adoption date of final rules) and as stated in the license conditions of grant.

(b) Licenses granted prior to (adoption date of final rules) for frequencies between 27.230 and 27.540 MHz will not be renewed or modified except as provided in subsection (c) below.

(c) Stations that have been licensed for a frequency between 27.230 and 27.540 MHz in a service other than the Citizens Radio Service, may be authorized upon application for renewal or modification to use the frequency 27.525 MHz under the same terms and conditions as their previous authorization but such renewal/modification shall be as a Class D station in the Citizens Radio Service. No licenses will be granted under this subsection after (five years following the adoption of final rules).

11. Section 95.45(a) is amended and par (d) added to read as follows:

§ 95.45 Frequency Tolerance.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, the carrier frequency of a transmitter in this service shall be maintained within the following percentage of the authorized frequency:

Class of station	Frequency tolerance	
	Fixed and base	Mobile
A	0.00025	0.0005
C		0.005
D		0.002

* * * * * * *

(d) Transmitters used at Class D stations operating on authorized frequencies between 26.96 MHz and 27.225 MHz and the frequency of 27.255 MHz, are permitted a frequency tolerance of 0.005 percent until (5 years after final rules).

12. Section 95.47(d) is amended to read as follows:

§ 95.47 TYPES OF EMISSION.

* * * * * * *

(d) Class D stations in this service are authorized to use emissions which comply with the following:

(1) Except as provided in § 95.55(c)(6), Class D stations using frequencies between 26.96 MHz and 27.310 MHz are authorized to use any form of amplitude voice modulation, either single or double sideband, until (5 years after adoption of final rules). After (5 years after adoption of final rules) only A3J sideband emissions will be permitted except on 27.065 MHz (Channel 9) and 27.085 MHz (Channel 11) where only A3H emission is permitted.

(2) Class D stations using frequencies between 27.310 MHz and 27.510 MHz are authorized to use only suppressed carrier single sideband amplitude modulation.

(3) Tone signals or signalling devices may be used only to actuate receiver circuits, such as tone operated squelch or selective calling circuits, the primary function of which is to establish or maintain voice communications. The use of any signal solely to attract attention or for the control of remote objects or devices is prohibited.

* * * * * * *

13. Section 95.49(c) is amended to read as follows:

§ 95.49 EMISSION LIMITATIONS

* * * * * * *

(c) The emissions normally available for assignment in the Citizens Radio Service and the corresponding emission designators and authorized bandwidths are as follows:

Class of station	Class of emission	Emission designator	Authorized bandwidth (kilohertz)
A	F2	16F2	20
	F3	16F3	20
C	A2	6A2	8
	A9	6A9	8
D	A3	6A3	8
	A3H	3A3H	4
	A3J	3A3J	4

* * * * * * *

14. A new Section 95.52 is added as follows:

§ 95.52 ANTENNA REQUIREMENTS.

Antennas used at Class D stations under this part must be designed to comply with the following technical requirements:

(a) *Omnidirectional antennas.*

(1) The maximum radiation in any horizontal direction shall be within 3 dB of the minimum radiation in any horizontal direction.

(b) *Directional antennas.*

(1) The maximum radiation in the horizontal direction shall not exceed the radiation at a point displaced 180° in azimuth from the point of maximum radiation by more than 30 dB.

(2) The maximum radiation referenced to the radiation from a half-wave dipole shall not exceed 8 dB.

(c) All antennas shall be designed so as to limit their power handling capabilities to values no greater than 10 dB above the values permitted in this part.

15. A new Section 95.54 is added as follows:

§ 95.54 ACCEPTABILITY OF ANTENNAS FOR USE AT CLASS D STATIONS.

Antennas acceptable for use at Class D stations under this part are included in the Commission's Antenna Acceptance List. Copies of this list are available for public reference at the Commission's Washington, D.C. offices and field offices. The requirements for antennas which may be used or marketed for use at Class D stations in this service are set forth in the following paragraphs.

(a) All antennas installed after (one year after effective date of the final rules) must be accepted by the Commission and comply with the technical requirements in Section 95.52 of this part.

(b) All antennas marketed pursuant to Section 2.803 of this chapter after (one year after effective date of the final rules) must be accepted by the Commission and comply with the technical requirements in Section 95.52 of this part.

(c) Antennas installed before (one year after effective date of the final rules) may continue to be used indefinitely, provided they are used at the same location and by the same licensee of the station, as specified in any license issued before (one year after final rules) and any renewal thereof. Any change of licensee or station location will require use of an antenna complying with paragraph (a) of this section.

16. Section 95.55(c)(5) & (6) are added to read as follows:

§ 95.55 Acceptability of Transmitters for Licensing.

(c) * * *

(5) All transmitters type accepted (one year after final rules) shall be capable of only single sideband emissions as specified in this Part.

(6) All transmitters first licensed or marketed as specified in § 2.803 of this chapter after (5 years after final rules) shall be capable of only single sideband emission as specified in this Part.

* * * * * * *

17. A new Section 95.56 is added as follows:

§ 95.56 Procedure for Antenna Acceptance.

(a) Any manufacturer of an antenna built for use at Class D stations in this service may request acceptance for such antenna in accordance with the antenna acceptance requirements of this part, following the antenna acceptance procedure set forth in Part 2 of this chapter.

(b) Acceptance for an individual antenna may also be requested by an applicant for a Class D station authorization by following the antenna acceptance procedure set forth in Part 2 of this chapter. Such antennas, if accepted, will not normally be included on the Commission's Antenna Acceptance List, but will be individually enumerated on the station authorization.

18. Section 95.58(c)(2) & (4) are amended, par (6), (7) & (8) added; and par (d)(6) & (7) amended to read as follows:

§ 95.58 Additional Requirements for Type Acceptance.

* * * * * * *

(c) * * *

(2) The frequency selector shall be limited to a detent type tuning device.

* * * * * * *

(4) Single sideband transmitters operating on frequencies between 26.96 MHz and 27.225 MHz and on the frequency 27.255 MHz shall be capable of operating on the upper sideband. On the frequencies between 26.96 MHz and 27.225 MHz and on 27.255 MHz capability on the lower sideband is permissible until (one year after final rules). Single sideband transmitters operating on the frequencies between 27.235 MHz and 27.510 MHz, shall be capable of operating only on the upper sideband with only the capability of A3J emission. For A3J emission the carrier must be attenuated at least 40 dB below the peak envelope power of the transmitter.

* * * * * * *

(6) After (one year after adoption of final rules) all emissions on 27.065 MHz (Channel 9) and 27.085 MHz (Channel 11) shall be limited to A3H with the carrier emitted at a level 3 to 6 dB below peak envelope power of the transmitter.

(7) After (one year after adoption of final rules) all transmitters equipped for operation on four or more shall be equipped to operate on 27.065 MHz (Channel 9) and 27.085 MHz (Channel 11).

(8) After (one year after adoption of final rules) all transmitters shall be capable of automatically providing the emission mode required on the channel to which it is tuned.

(d) * * *

(6) Upper-lower sideband selector; for single sideband transmitters only. This control is not permitted after (one year after final rules).

(7) Selector for choice of carrier level; for single sideband transmitters only. May be combined with sideband selector. This control is not permitted after (one year after final rules).

* * * * * * *

19. A new Section 95.81 is added to read as follows:

§ 95.81 PERMISSIBLE COMMUNICATIONS.

Stations licensed in the Citizens Radio Service are authorized to transmit, primarily between units of the same station, the following types of communications:

(a) Communications to facilitate the personal or business activities of the licensee.

(b) Communication relating to:

(1) the immediate safety of life or the immediate protection of property in accordance with § 95.85.

(2) the rendering of assistance to a motorist or mariner.

(3) civil defense activities in accordance with § 95.121.

(4) other activities only as specifically authorized pursuant to § 95.87.

Communications with stations authorized in other radio services except as prohibited in § 95.83(a)(3).

20. Section 95.83 (a)(1) through (12) is amended to read as follows:

§ 95.83 PROHIBITED COMMUNICATIONS.

(a) A citizens radio station shall not be used:

(1) For any purpose, or in connection with any activity, which is contrary to Federal, State, or local law.

(2) For the transmission of communications containing obscene, indecent, or profane words, language, or meaning.

(3) To communicate with an Amateur Radio Service station, an unlicensed station, or foreign stations (other than as provided in Subpart E of this part) except for communications pursuant to §§ 95.85(b) and 95.121.

(4) For any communication not directed to specific stations or persons, except, for (i) Emergency and civil defense communications as provided in §§ 95.85(b) and 95.121, respectively, (ii) test transmissions pursuant to § 95.93 and (iii) communications from a mobile unit to other units or stations for the sole purpose of requesting routing directions, assistance to disabled vehicles or vessels, information concerning the availability of food or lodging or any other assistance necessary to a licensee in transit.

(5) To convey program material for retransmission, live or delayed, on a broadcast facility.

NOTE: A Class A or Class D station may be used in connection with administrative, engineering, or maintenance activities of a broadcasting station; a Class A or Class C station may be used for control functions by radio which do not involve the transmission of program material; and a Class A or Class D station may be used in the gathering of news items or preparation of programs: Provided, that the actual or recorded transmissions of the Citizens radio station are not broadcast at any time in whole or in part.

(6) To intentionally interfere with the communications of another station.

(7) For the direct transmission of any material to the public address system or similar means.

(8) For the transmission of music, whistling, sound effects, or any material for amusement or entertainment purposes, or solely to attract attention.

(9) To transmit the word "MAYDAY" or other international distress signals, except when a ship, aircraft, or other vehicle is threatened by grave and imminent danger and requests immediate assistance.

(10) For advertising or soliciting the sale of any goods or services.

(11) For transmitting messages in other than plain language. Abbreviations including nationally or internationally recognized operating signals, may be used only if a list of all such abbreviations and their meaning is

kept in the station records and made available to any Commission representative on demand.

(12) To carry communications for hire, whether the remuneration or benefit received is direct or indirect.

* * * * * * *

21. Section 95.85(b) (1) & (2) is amended to read as follows:

§ 95.85 Emergency and Assistance to Motorist Use.

* * * * * * *

(b) * * *

(1) When use for transmission of emergency communications certain provisions in this part concerning use of frequencies (§95.41(d)); prohibited uses (§ 95.83(a)(3) and (4); operation by or on behalf of persons other than the licensee (§ 95.87); and duration of transmissions (§ 95.91(a) and (b)) shall not apply.

(2) When used for transmission of communications necessary to render assistance to a motorist, the provisions of this Part concerning directing communications to specific persons or stations (§ 95.83(a)(4)) and duration of transmissions (§ 95.91(b)) shall not apply.

* * * * * * *

22. Section 95.91 is amended to add new paragraphs (b) and (c) and to redesignate the present paragraphs (c) and (d), as (e) and (f), respectively.

§ 95.91 Duration of Transmissions.

(a) * * *

(b) All communications between Class D stations shall be restricted to not longer than five (5) continuous minutes. At the conclusion of this 5 minute period, or the exchange of less than 5 minutes, the participating stations shall remain silent for at least one minute.

(c) All communications between units of the same Class D station shall be restricted to the minimum practicable transmission.

* * * * * * *

23. Section 95.95(c) is amended to read as follows:

§ 95.95 Station Identification.

* * * * * * *

(c) Except as provided in paragraph (d) of this section, all transmissions from each unit of a citizens radio station shall be identified by the transmission of its assigned call sign at the beginning and end of each transmission or series of transmissions. Where communications of more than ten (10) minutes are permitted, the call sign must be transmitted once during each ten (10) period.

* * * * * * *

24. Section 95.101 is amended by adding a new par (c) to read as follows:

§ 95.101 Posting Station License and Transmitter Identification Cards or Plates.

* * * * * * *

(c) When a Class D transmitter is installed in a motor vehicle, in addition to the provisions in paragraph (b) above, an executed Transmitter Identification Card (FCC Form 452-c) or a plate of metal or other durable substance, legibly indicating the station call sign shall be affixed to the vehicle so as to be clearly visible from outside the vehicle.

* * * * * * *

25. Section 95.119(d) is amended to read as follows:

§ 95.119 Control Points, Dispatch Points, and Remote Control.

* * * * * * *

(d) Operation of any Class C or Class D station by remote control is prohibited except remote control by wire upon specific authorization by the Commission when satisfactory need is shown.

FCC 74-746

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COAXIAL COMMUNICATIONS OF WHITEHALL, INC., WHITEHALL, OHIO For Certificate of Compliance	CAC-2398 (OH307)

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 18, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. On April 18, 1973, Coaxial Communications of Whitehall, Inc. filed an application for certificate of compliance to operate a new cable television system at Whitehall, Ohio, which is located within the Columbus, Ohio, major television market (#27). The system will carry the following television broadcast signals:[1]

WBNS-TV (CBS, Channel 10) Columbus, Ohio
WLWC (NBC, Channel 4) Columbus, Ohio
WTVN-TV (ABC, Channel 6) Columbus, Ohio
WOSU-TV (Educ., Channel 34) Columbus, Ohio
WUAB (Ind., Channel 43) Lorain, Ohio
WKBF-TV (Ind., Channel 61) Cleveland, Ohio
WXIX-TV (Ind., Channel 19) Newport, Kentucky

Carriage of the above signals is consistent with the provisions of Section 76.61 of the Commission's Rules. The application is unopposed.

2. Coaxial Communications requests a partial waiver of Section 76.251(a)(4) in order to share the studio and production facilities available at its existing cable television system at Columbus, Ohio for use by residents and institutions of both Columbus and Whitehall. It states that it "presently owns and maintains a fully equipped studio which is conveniently located near Whitehall . . . equipped with three studio color cameras, one studio black and white camera and one portable black and white camera—VTR unit". In addition, the studio is equipped with a "central console, adequate lighting and videotaping facilities," all of which are available for the production of programming by the public. Apart from the obvious economic advantages of the use of a single studio and common equipment, Coaxial Communications avers that "the consolidated studio approach will enable us to provide better and more meaningful technical and other

[1] The City of Whitehall has a population of 25,203 and will be served by one integrated system which already provides cable television service to 2,203 subscribers in the City of Columbus, which has a population of 540,025. The system will offer 26 channels: 7 for television signal carriage and one for automated program originations in addition to the required access channels.

assistance to members of the public who wish to use the separate access channels being provided to each city." In addition, although physically within the city limits of Columbus, the studio is virtually on the borderline between Columbus and Whitehall and is readily accessible from both cities. Coaxial Communications submits that, in all other respects, its access proposal fully complies with the access provisions of the Commission's Rules.

3. We have, upon proper showings, permitted cable systems to construct access studio and production facilities to be shared by several communities. *Community Television, Inc.*, 43 FCC 2d 1090 (1973), *recons. granted* FCC 74-495, —— FCC 2d —— (1974). Indeed, in Paragraph 147 of the *Cable Television Report and Order*, 36 FCC 2d 143, 197 (1972), we stated that in complying with access requirements, cable systems were "free to meet their obligations through joint building and related programs with cable operators in the larger core areas." And in *Saginaw Cable TV Co.*, 39 FCC 2d 496 (1973), we permitted new systems to meet our access requirements by sharing access channels, an access studio, and production facilities for communities with an aggregate population of 129,681. While the public access studio and production facilities will not be within the franchise area as required by Commission Rules,[2] we believe the access proposal offered by Coaxial Communications is reasonable and should be sufficient to meet the needs of both communities. The evidence submitted shows that the City of Whitehall will be served by a single integrated system, that a separate set of access channels will be available to serve the community needs, and that the access studio and production facilities are readily accessible from both Whitehall and Columbus. We note that the communities involved in the proposed sharing of the facilities were served with copies of the access proposal and have interposed no objection to the proposal.[3] We conclude that Coaxial has adequately demonstrated the need for a partial waiver of Section 76.251(a)(4) of the Rules.

4. We note that Coaxial Communications' franchise, which was granted on January 5, 1971, is not fully consistent with the standards of Section 76.31 of the Commission's Rules.[4] However, Coaxial Communications assures us that the franchise was granted at a public proceeding at which all interested parties were afforded the opportunity to be heard and prior to which, public notice of the filing of the franchise application was given by the City of Whitehall. The franchise specifies initial subscriber rates which can only be changed

[2] In Paragraph 142 of the *Cable Television Report and Order*, 36 FCC 2d 143, 196 (1972), we stated: In any event, we are requiring that the cable operator maintain *within the franchise area* production facilities for use on the public access channel (emphasis supplied).

[3] Indeed, the Mayor of Whitehall and the Director of Public Utilities for the City of Columbus have informed the Commission by letter that they have no objection to the sharing of facilities.

[4] Section 917.08 of the franchise requires Coaxial to provide full time, non-duplicated carriage to any stations licensed to the City of Columbus "even though the Federal Communications Commission at some future date might amend or even eliminate rules and regulations applicable to carriage and protection of local stations". A statement of clarification submitted by the applicant construes this section not to be in conflict with the Commission's Rules especially since the last sentence of that section states that the requirement "shall remain in force so long as there are no laws, rules or regulations prohibiting such carriage." In any case, because signal carriage and exclusivity regulation is solely within the jurisdiction of this Commission, we will treat this section as a nullity. See *T-V Transmission, Inc.*, FCC 74-118, 45 FCC 2d 400.

with the approval of the city council. The franchise specifies a construction schedule which requires significant construction within one year and that service be available to all residences in the city within two years after commencement of construction. The franchise duration is for a period of twelve years from the effective date of the ordinance. The franchise provides for the investigation and resolution of local service complaints and requires the franchisee to maintain a local business office in Whitehall, Ohio. Coaxial Communications is required to pay a minimum annual fee of $1,000, which is credited toward the annual franchise fee of 6% of gross receipts received from sources within the city. Since only substantial compliance with Section 76.31 of the Rules must be demonstrated for a franchise granted before March 31, 1972, we find that the franchise submitted by Coaxial Communications substantially complies with Section 76.31 of the Rules in a manner sufficient to justify a grant of this application until March 31, 1977. See *CATV of Rockford, Inc.*, 38 FCC 2d 10 (1972), *recons. denied*, 40 FCC 2d 493 (1973). Additionally, when Coaxial Communications applies for recertification, we will expect it to show the degree to which its access proposal has been successful and has operated in the public interest.

In view of the foregoing, the Commission finds that a grant of the above-captioned application and a partial waiver of Section 76.251 (a)(4) of the Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" (CAC–2398) filed by Coaxial Communications of Whitehall, Inc. for the community of Whitehall IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

47 F.C.C. 2d

109-004—74——6

FCC 74-786

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AUTHORIZATION OF COMMEMORATIVE STATIONS IN THE AMATEUR RADIO SERVICE	Docket No. 20111

NOTICE OF PROPOSED RULEMAKING

(Adopted July 17, 1974; Released July 24, 1974)

BY THE COMMISSION: COMMISSIONER LEE CONCURRING IN THE RESULT: COMMISSIONERS QUELLO, WASHBURN, AND ROBINSON NOT PARTICIPATING.

1. Notice of Proposed Rule Making in the above captioned matter is hereby given.

2. The Commission in this action is proposing to adopt rules which will liberalize and clearly delineate the provisions under which amateur operators may obtain a commemorative station license. Under the present rules and policies, a special event authorization is issued only when an applicant can show the event is of general public interest of at least a statewide basis. Many applicants have been unable to meet this criteria even though the event may have been very significant to a particular group of people.

3. To alleviate this problem, our proposed rules would establish a new class of amateur station, i.e., commemorative station, which would be issued for any celebration that is either unique, distinct and of general interest to the public or amateur operators. The primary purpose of this station would be to bring public notice to the Amateur Radio Service by allowing an amateur station with a distinctive call sign to be operated at an event or celebration so as to help attract more contacts.

4. The specific licensing requirements for a commemorative station are set forth in the Appendix in § 97.41. Essentially stated, an Amateur Extra or Advanced Class licensee will be allowed to file an application in letter form for a commemorative station, giving the details of the authorization desired. While our proposed rules would permit the use of multiple transmitters at a station, portable or mobile operations would be prohibited. A commemorative station will not be licensed for any amateur operating contest.

5. The effect of our proposed rules is to remove authorizations for commemorative stations from the category of Special Temporary Authorization. Under our proposed rules, they would constitute a formal class of amateur station and thus the usual application fees will be imposed. The regular new station application filing fee would be required, and in addition, if a specific call sign is requested, the usual special call sign fee would be required. We believe that the imposition

of these fees is appropriate in view of the amount of processing time involved with these applications.

6. Authority for the proposed rule changes herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, and Title V of the Independent Offices Appropriations Act of 1952.

7. Pursuant to applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before October 30, 1974 and reply comments on or before November 16, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision on the rules which are proposed herein, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

8. In accordance with the provisions of § 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, pleadings, briefs, or other documents shall be furnished the Commission.

9. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's public reference room at its headquarters in Washington, D.C., (1919 M Street, N.W.)

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. § 97.3(i) is amended to add a new definition "*Commemorative station*" immediately after *Repeater station* to read as follows:

§ 97.3 DEFINITIONS.

* * * * * * *

(i) * * *

Repeater station.

Commemorative station. Station licensed at a specific land location for operation in commemoration of a celebration which is unique, distinct, and of general interest to either the public or to amateur radio operators, for the purpose of bringing public notice to the Amateur Radio Service.

2. § 97.40(c) is amended to read as follows:

§ 97.40 STATION LICENSE REQUIRED.

* * * * * * *

(c) An amateur radio operator may be issued one or more additional station licenses, each for a different land location, except that repeater station, control station, auxiliary link station, and commemorative station licenses may be issued to an amateur radio operator for land locations where another station license has been issued to the applicant.

* * * * * * *

3. Sections 97.41(a) and 97.41(g) are amended and § 97.41(f) is added to read as follows:

§ 97.41 APPLICATION FOR STATION LICENSE.

(a) Each application for a club or military recreation station license in the Amateur Radio Service shall be made on the FCC Form 610-B. Each application for any other amateur radio license, except a commemorative station, shall be made on the FCC Form 610.

* * * * * * *

(f) An application by letter to the Amateur and Citizens Division, Federal Communications Commission, Washington, D.C. 20554, may be made by an Advanced Class or Amateur Extra Class licensee for one commemorative station for the period of the celebration, but not to exceed 30 days unless extraordinary circumstances are shown. The request letter shall contain the following:

(1) The name, mailing address, photocopy of amateur operator license, and signature of applicant.
(2) The name and description of the celebration, its significance to the public or to amateur radio operators, and the justification for the proposed commemorative station.
(3) The location of the proposed station.
(4) The dates the station will be operated, and justification.
(5) Specific call sign requested, if desired.

(g) One application and all papers incorporated therein and made a part thereof shall be submitted for each amateur station license. If the application is only for a station license, other than a commemorative station, it shall be filed directly with the Commission at its Gettysburg, Pennsylvania office. If the application also contains application for any class of amateur operator license, it shall be filed in accordance with the provisions of § 97.11.

* * * * * * *

4. § 97.51(a)(4) is amended to read as follows:

§ 97.51 Assignment of Call Signs.

(a) * * *

(4) A specific unassigned call sign may be temporarily assigned to a commemorative station.

* * * * * * *

5. In § 97.95 the headnote is revised and § 97.95(a)(i) is amended to read as follows:

§ 97.95 Operation Away From the Authorized Fixed Operation Station Location.

(a) * * *

(1) When there is no change in the authorized fixed operation station location, an amateur radio station other than a military recreation, auxiliary link, or commemorative station, may be operated under its station license anywhere in the United States, its territories or possessions, as a portable or mobile operation, subject to § 97.61.

* * * * * * *

FCC 74-742

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CONSOLIDATED TV CABLE SERVICE, INC., FRANKFORT, KY. Request for Special Relief	CSR-310 (KY025

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 18, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND HOOKS CONCURRING IN THE RESULT.

1. On December 29, 1972, Consolidated TV Cable Service, Inc., operator of a cable television system at Frankfort, Kentucky, filed a "Petition for Special Relief" (CSR-310) directed against Community Service, Inc., also operator of a cable television system at Frankfort, Kentucky, requesting the Commission to order Community Service to cease allegedly anti-competitive activities. On February 26, 1973, Community Service filed "Community's Opposition to 'Petition for Special Relief' and Request for Immediate Denial and/or Dismissal Without Further Proceedings." And on May 5, 1973, Consolidated filed its "Reply." [1]

2. Frankfort, Kentucky, is located in the Lexington, Kentucky, smaller television market. Both Consolidated and Community Service operate twelve-channel cable television systems at Frankfort. Consolidated has almost four thousand subscribers, while Community Service has almost six thousand. Community styles itself as a "non-profit municipally-affiliated CATV system." It operates pursuant to a contract with the Electric and Water Plant Board, which is owned and operated for the benefit of the City of Frankfort. Pursuant to its contract with the Board, Community Service operates the cable television system, while the Board retains all ownership rights to it. Although Community Service is a separate corporate entity from the Board, its contract with the Board provides that the Board may appoint three of Community Service's six Directors. The contract also gives Community Service free use of all poles owned by the Board as well as all poles available to the Board pursuant to a joint use agreement with the Southern Bell Telephone Company.

3. Consolidated is a privately-owned and operated cable television system. It does not hold a franchise or other authorization from the City of Frankfort, but instead has a contract with the Electric and Water Plant Board for the use of its poles. Consolidated's contract with the Board does not provide for free use of all the Board's poles

[1] The National Cable Television Association and the Kentucky Cable Television Association have both filed comments in support of Consolidated's position.

throughout the City, however, and does not give free use of Southern Bell's poles—for which Consolidated currently pays three dollars per pole per year.[2]

4. Consolidated claims that it is subject to unfair competition in Frankfort. It alleges that through its Plant Board, the City has hampered Consolidated, while at the same time helping Community. Consolidated claims that the Plant Board refused to execute a new agreement with Consolidated in 1965, but that the Plant Board and Community then entered into a new agreement whereby the Plant Board leased its distribution system to Community for a dollar per year nominal fee. This agreement is valid until September 19, 1977. Consolidated also claims that the Plant Board is responsible for Consolidated's lack of free use of Southern Bell's poles because of Southern Bell's position that Consolidated and Community may use its poles only with the approval of the Plant Board. Consolidated also claims discrimination in the fact that Community has expanded into most areas of Frankfort and has overbuilt most of Consolidated's system, while Consolidated has been denied the right to use the Board's poles to expand into South and West Frankfort.[3] Consolidated claims that Community's expansion has resulted in a loss of approximately 400 subscribers and a virtual halt in its growth. Consolidated maintains that it has been forced to lower its monthly service charge to $2.50 to compete with Community, which can operate at a loss. Consolidated states that Community's rate is designed to force Consolidated out of business.

5. Community disputes Consolidated's allegations regarding discrimination and contends that Consolidated is not entitled to relief. Community claims that Consolidated operates under more favorable conditions than most cable systems. First, Community maintains that the Plant Board is independent of the City and that Community has no legal connection with the Board except for the operating agreement between them. Second, Community maintains that it is advantageous for Consolidated to operate without a franchise, since its activities thus are largely unregulated and it does not pay a fee to the City. Community contends that the Plant Board offered to renew the contracts of both Consolidated and Community in 1965, but that because of a conflict between Consolidated and the Plant Board regarding exclusive areas of operation agreement was not reached. In regard to Consolidated's relations with Southern Bell, Community states that neither it nor the Plant Board can require Southern Bell to provide free use of its poles to any party. Third, Community states that it commenced operation in 1952 to provide otherwise unavailable television service, but that Consolidated did not become an operating cable system until 1959. Community thus argues that Consolidated was cognizant of the competition from Community when it commenced its operations. Community also claims that the Plant Board did not pro-

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[2] The pleadings do not indicate whether Southern Bell would be required to give Consolidated free use of its poles pursuant to its agreement with the Board. A letter of June 9, 1958, from Southern Bell to the Board, however, states that Southern Bell would give Consolidated free use of its poles upon the Board's request.

[3] The Plant Board action was challenged and upheld in *Consolidated Television Service, Inc.* v. *Beary*, 382 S.W. 2d 781 (Ky. Ct. App. 1964).

hibit Consolidated from expanding into areas of Frankfort already served by Community, but merely restricted Consolidated from using its poles in certain areas. Community calculates its growth rate for the last five years to be 29 percent and Consolidated's rate 16 percent. It claims these figures are a result of competition, rather than unfair competition.

6. Several aspects of the competition between Community and Consolidated have been the subject of litigation. In *Consolidated Television Cable Service, Inc.* v. *City of Frankfort*, 465 F. 2d 1190 (6th Cir. 1972), the Sixth Circuit affirmed the District Court's dismissal of the case. The Court of Appeals held that the City did not violate the equal protection clause of the fourteenth amendment by its authorization of a cable system in competition with the privately-owned system, where the private system had no franchise, contract, or license to operate. The court also held that the City did not violate the due process clause of the fourteenth amendment by its failure under a state antiduplication statute to condemn its cable operation in competition with the privately-owned system. And the Court ruled that Consolidated's contentions that a city had no statutory authority to operate a cable system under Kentucky law did not involve federal constitutional rights, but were questions of state law to be determined by the courts of Kentucky. Two cases involving the subject parties remain pending before Kentucky courts. *Norrell and Consolidated Television Cable Service, Inc.* v. *Frankfort Electric & Water Plant Board and Community Service, Inc.*, No. 82087 (Cir. Ct., Franklin County, Kentucky, filed July 30, 1971) and *Consolidated Television Cable Service, Inc.* v. *City of Frankfort, Electric & Water Plant Board, and Community Service, Inc.*, No. 83580 (Cir. Ct., Franklin County, Kentucky, filed October 4, 1972). In those cases, Consolidated is challenging the legality of the operation of a cable system by the City of Frankfort under Kentucky law.

7. Consolidated thus has raised a host of rather murkily defined issues, ranging from the Commission's policies towards municipally-affiliated systems to the question of discrimination by a local regulatory authority among competing cable systems. Moreover, the already voluminous pleadings in this proceeding are regrettably vague concerning such major issues as the Board's relation to the City, Community's relation to the Board, and the Board's relation to Southern Bell. We therefore decline to issue the requested special relief.

8. The Commission never has either favored or opposed municipal involvement in cable television. Indeed, municipally-affiliated cable systems have existed for two decades, and we were well aware of their existence when we adopted the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143. Accordingly, the City of Frankfort's direct or indirect involvement with Community Service is immaterial. Similarly, we never have attempted to discourage competition between cable systems in the same geographic area. Indeed, we have encouraged such head-on competition through our certificating process; we deliberately have consolidated applications for certificates of compliance from potentially competing systems, in order to give applicants a more equal competitive stance. See, e.g., *Lake County Cable TV, Inc.*, FCC 73–904, 42 FCC 2d 952.

9. Consolidated has raised a possible claim, however, concerning discriminatory use of pole attachment rights. By a Public Notice of August 3, 1973, FCC 73–851, we announced that we had directed our staff to prepare appropriate documents asserting jurisdiction over pole attachment practices. And more recently, we issued an order against potentially discriminatory pole attachment practices. In *Continental Cablevision of New Hampshire, Inc.*, FCC 74–432, —— FCC 2d ——, we thus designated for hearing a telephone company's alleged discrimination in allocation of "make ready" costs between cable systems. We noted there, Par. 3, that: "We do have jurisdiction over cable systems and authorize their carriage of distant television signals, and we have a substantial concern that they operate on a reasonable competitive basis. The situation presented here clearly warrants a hearing to determine whether United is doing so." Consolidated has failed to make a sufficient showing that a discriminatory situation exists in Frankfort. Consolidated is free to initiate a new proceeding, however, if it can demonstrate the existence of anti-competitive conduct.[4]

In light of the foregoing, the Commission finds that grant of the requested special relief would be inconsistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Special Relief" (CSR–310) filed by Consolidated TV Cable Service, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[4] Compare "Letter to Thomas W. Scandlyn et al.," FCC 74–259, 45 FCC 2d 1058.

FCC 74R-271

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DEEP SOUTH RADIO, INC., HATTIESBURG, MISS.	Docket No. 19889 File No. BPH-8376
VERNON C. FLOYD, RUBEN C. HUGHES, AND ROBERT L. FLOYD, D.B.A. CIRCUIT BROADCASTING CO., HATTIESBURG, MISS.	Docket No. 19890 File No. BPH-8443
JAMES A. MCCULLOUGH ENTERPRISES, HATTIESBURG, MISS.	Docket No. 19891 File No. BPH-8614
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 25, 1974; Released July 29, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT, BOARD MEMBER EMERSON DISSENTING WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of Deep South Radio, Inc. (Deep South), Circuit Broadcasting Company (Circuit) and James A. McCullough Enterprises (McCullough) for a new FM broadcast station at Hattiesburg, Mississippi. By Order of the Chief of the Broadcast Bureau, acting pursuant to delegated authority, 38 FR 34906, published December 20, 1973, these applications were designated for consolidated hearing on the standard comparative issue. Presently before the Review Board are two petitions to enlarge issues against McCullough filed January 4, 1974, by Deep South and Circuit. Each petition requests issues with respect to McCullough's past and/or present ownership in other radio stations, his character qualifications and his past broadcast record. In addition, Deep South's petition also requests addition of a financial issue against McCullough.[1]

[1] Also before the Board are the following related pleading: (a) opposition, filed January 31, 1974, by McCullough; (b) comments, filed January 31, 1974, by the Broadcast Bureau; (c) comments, filed January 31, 1974, by the Broadcast Bureau; (d) reply, filed February 19, 1974, by Deep South; (e) reply, filed February 19, 1974, by Circuit; (f) supplement to (a), filed April 12, 1974, by McCullough; (g) supplement to petition to enlarge, filed April 17, 1974, by Deep South; (h) opposition to (f), filed April 19, 1974, by Circuit; (i) reply to (f), filed April 24, 1974, by Deep South; (j) reply to (g), filed April 26, 1974, by McCullough; (k) comments on (g), filed May 1, 1974, by the Broadcast Bureau; (l) petition for official notice, filed May 3, 1974, by Circuit; (m) comments on (l) filed May 14, 1974, by the Broadcast Bureau; (n) comments on (l), filed May 14, 1974, by McCullough; (o) Broadcast Bureau erratum, filed May 15, 1974; (p) reply to (m), filed May 20, 1974, by Circuit. The supplementary pleadings are unauthorized, no request for their acceptance has been made, and good cause for their filing has not been shown. Therefore, the supplementary pleadings will be dismissed. *Supplemental Pleadings Before the Review Board*, 40 FCC 2d 1026 (1972); *WIOO, Inc.*, 40 FCC 2d 217, 26 RR 2d 1611 (1973).

OWNERSHIP IN OTHER RADIO STATIONS

2. Initially, both petitioners note that McCullough's application states that until March 30, 1973, McCullough had a 49% ownership interest in standard broadcast Station WXXX in Hattiesburg and in Station KCRI–FM in Helena, Arkansas, as well as a 25% ownership interest in Stations WSWG (AM–FM) in Greenwood, Mississippi.[2] and that, while he has disposed of his ownership interests, he continues to be employed by these stations in a management capacity pending a determination of his application in the present proceeding. Petitioners also note that a search of these stations' ownership reports reveals a document entitled "substance of agreement", which reports the purported ownership changes to the Commission. Petitioners further note that this "agreement" is dated March 30, 1973, and states, *inter alia*, that McCullough is to receive $60,000 from his former partner, C. D. Saunders (see note 2, *supra*); that "in the event one-third of the profits is insufficient to provide the $60,000 . . . the purchase price shall be reduced to an amount equal to one-third of said profits"; that McCullough will remain as general manager of the stations until they are sold; and that a written agreement is being finalized for submission to the Commission. Circuit and Deep South attack this "substance of agreement" on several grounds. First, both argue that its terms are so vague and tentative that it is a meaningless document and, due to the lack of detail and/or signatories, it has no legal effect and cannot be binding. Therefore, they argue, a question is raised as to whether McCullough has, in fact disposed of his ownership interests in these stations. Deep South also believes that this matter raises a question as to whether McCullough has misrepresented the true facts of the alleged transfer to the Commission. In addition, Circuit contends that the vagueness of this document raises a question as to whether McCullough will be "financially divorced" from the stations; if he is to be a creditor of these stations, then he should not be permitted to hold a license for another station in Hattiesburg, citing *The Yankee Network, Inc.*, 5 RR 216 (1949). Finally, Circuit insists that if an agreement has, in fact, been executed, an inquiry should be made as to whether the ownership reports for these stations have been kept up to date.

3. In opposition, McCullough first submits a joint affidavit of McCullough and Saunders averring that McCullough has had absolutely no ownership interest in the stations in question since March of 1973. Attached to the joint affidavit is an executed agreement dated January 28, 1974, which outlines the terms of the sale.[3] As to why the agreement was not formally executed earlier, McCullough argues that the oral agreement was legally binding, that the Commission does not require the sale of minority stock to be immediately formalized, and, more important, that the substance of the agreement was timely reported. The Broadcast Bureau opposes the inquiry sought by the petitioners on the grounds that the joint affidavit from Saunders and McCullough affirms that the stock sale was consummated, and

[2] One C.D. Saunders owns the other interests in these stations.
[3] McCullough also notes that, by the terms of this agreement, he cannot be a creditor of Station WXXX because Saunders will execute the notes personally.

that the petitioners' allegations are speculative and without the necessary affidavit of one with personal knowledge.

4. The Review Board agrees with McCullough and the Broadcast Bureau that petitioners' allegations are insufficient to warrant an evidentiary inquiry into McCullough's reporting of the disposition of his minority stock in the four stations in question. Petitioners' allegations are highly speculative in nature, are based solely on surmise, and are not supported by affidavits of persons with first hand knowledge of the facts. See Section 1.229(c) of the Commission's Rules. See also *First Illinois Cable TV, Inc.*, 14 FCC 2d 232, 13 RR 2d 1121 (1968); *Babcom, Inc.*, 13 FCC 2d 268, 13 RR 2d 435 (1968). Moreover, petitioners have offered nothing of substance to contradict the affidavit of McCullough and Saunders averring that they have, in fact, formally executed the sale and have done so in basic accord with McCullough's earlier stated intention, as outlined in the "substance of agreement".

PAST BROADCAST RECORD

5. Next, petitioners note that the Commission, in response to petitions from local citizens and after its own field investigation, directed Station WSWG, Greenwood, Mississippi (in which McCullough had an ownership interest, paragraph 2, *supra*) to file for early license renewal in order to permit inquiry into: (1) the licensee's representations concerning non-entertainment programming, particularly as to the problems and needs of the black community; (2) whether the licensee made misrepresentations in this regard; and (3) whether the licensee violated Section 73.125 of the Commission's Rules, which relates to equal employment opportunities. *Leflore Broadcasting Co., Inc.*, 36 FCC 2d 101, 24 RR 2d 953 (1972).[4] Petitioners also note that similar petitions from local citizens and groups have been filed against Station WXXX in Hattiesburg, and that on October 30, 1970, and August 16, 1972, Notices of Apparent Liability from the Commission were issued to WXXX for operating with excessive power and for late-filing of its renewal application. Therefore, argue petitioners, because McCullough was in charge of these stations during the periods in question, issues should be added in this proceeding to determine whether McCullough is competent to own and operate another broadcast facility, whether McCullough made misrepresentations to the Commission, whether McCullough violated the Civil Rights Act of 1964 and/or the Commission's equal opportunity requirements, and whether McCullough has the requisite character qualifications to be a Commission licensee.

6. As to the "past operation" of WXXX and the investigation of WSWG AM–FM by the Commission, McCullough argues that there is absolutely no indication that he was involved in any wrongdoing and that no special issue is required because all relevant information can be brought out under the standard comparative issue's "past

[4] Subsequently, on May 2, 1974, the Commission designated for hearing the renewal applications of Stations WSWG AM–FM on, *inter alia*, misrepresentation and equal employment opportunity/discrimination issues, FCC 74–441, 39 FR 16408, published May 8, 1974. On May 3, 1974, Circuit requested the Board to take official notice of this designation Order. We will grant Circuit's request.

broadcast experience" criterion.[5] In response to Circuit's petition to take official notice of the designation Order in the WSWG proceeding (see note 4, *supra*) McCullough takes the position that, at most, a grant in the instant proceeding to him could be made subject to further review should there be adverse findings against him in the WSWG proceeding, but that action by the Board at this time would be "premature". The Broadcast Bureau urges that, since the renewal applications of WSWG AM–FM have been designated for hearing, that proceeding provides an adequate forum for resolution of such matters. Therefore, suggests the Bureau, a condition should be added in this proceeding stating that if McCullough's application is preferred, a grant will be withheld pending favorable resolution of the other proceeding.

7. Rather than add additional issues in this proceeding, the Board believes that the more appropriate procedure would be to make a grant to McCullough in this proceeding contingent upon any findings and conclusions in the WSWG AM–FM proceeding which reflect on *his* qualifications to be a Commission licensee. McCullough's involvement at the Greenwood radio stations could possibly reflect on his fitness to be a Commission licensee. *KFNF Broadcasting Corp.* (*KFNF*), FCC 63R–99, 24 RR 1170 (1963).[6] Therefore, we will follow the Bureau's suggestion and require that a final grant to McCullough be withheld pending the outcome of the WSWG proceeding.[7]

FINANCIAL ISSUE

8. Finally, Deep South alone argues that McCullough has not shown that he is financially qualified in that his two primary sources of financing are, by their terms, inadequate to meet Commission requirements. McCullough estimates first year costs of $94,784.92, and to meet such costs, proposes $15,000 in existing capital, a $150,000 line of credit from the First National Bank of Jackson, Mississippi, $60,000 notes receivable from the sale of four radio stations (see paragraph 2, *supra*), and finally, a letter of credit from his equipment supplier. First, Deep South points to a term in the bank letter which states the loan will be secured by real and personal property ". . . and/or other collateral deemed to be sufficient by the bank. . . ." In Deep South's view, case precedent precludes reliance on a loan commitment couched in such terms, citing *Western Communications, Inc.* (*KORK–TV*) 39 FCC 2d 1077, 26 RR 2d 1456 (1973); *Jackson Missouri Broadcasting Company*, 14 RR 2d 445 (1968); and *Louis Vander Plate*, 13 FCC 2d 952, 13 RR 2d 1040 (1968). Equally unreliable, in Deep South's view, is the $60,000 "note receivable" because it does not represent a "definite commitment" and also because a term of the "substance of agreement" discussed above (see paragraph 2, *supra*) states that, "in the event one-third of the profits is insufficient

[5] In this regard McCullough argues that because he was only a minority stockholder, the question under the standard comparative issue should be dealt with under past broadcast experience, rather than past broadcast record. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398, 5 RR 2d 1901, 1911–13 (1965).

[6] The Board does not consider the two notices of apparent liability issued to Station WXXX to be so significant as to require further inquiry. Moreover, it appears that one of the notices was issued at a time when McCullough was not involved with the station.

[7] The Bureau makes the suggestion in its comments on Circuit's petition for official notice (see notes 1 and 4, *supra*). Circuit supports such action.

to provide the $60,000 for McCullough's interests, the purchase price shall be reduced to an amount equal to one-third of said profits." Therefore, argues Deep South, McCullough has not shown that he can meet his estimated costs and a financial issue is required.

9. In opposition to Deep South's arguments concerning the security collateral requirements of the bank, McCullough argues that an "objective and reasonable interpretation" of the condition in question is that McCullough will simply secure the loan by property and personal endorsements and/or collateral. Moreover, contends McCullough, absent some indication that the loan commitment is not firm, the failure to specify exactly what the collateral will be does not raise a substantial question as to the availability of the loan. Therefore, concludes McCullough, no issue is required. The Broadcast Bureau opposes addition of a financial issue, expressing the belief that McCullough's willingness and ability to provide security for the loan indicates that the term in the bank loan letter questioned by Deep South does not endanger its availability. In this regard, the Bureau rejects Deep South's criticism of the $60,000 note receivable on the grounds that McCullough is not relying on it and can meet his estimated expenses without it.

10. The Board will not add a financial issue against McCullough. McCullough's application shows that he plans to meet first year costs with existing capital and the bank loan. He does not rely on the $60,000 note receivable from Saunders unless "additional capital" is needed. Thus Deep South's criticism of this aspect of his financial proposal is premature and speculative. See paragraph 4, *supra*. Finally Deep South's criticism of the bank loan collateral requirements is without merit in the total context of McCullough's financial showing. His most recent balance sheet shows assets in excess of liabilities in an amount greater than that which he plans to borrow and his willingness to pledge any or all of these assets as collateral is evidenced by the amendment to his financial proposal so stating. Thus, we agree with the Bureau that the term in the bank lettter questioned by Deep South represents nothing more than a normal precautionary provision which does not endanger the validity or availability of the commitment.[8]

11. Accordingly, IT IS ORDERED, That the supplement to opposition, filed April 12, 1974, by James A. McCullough Enterprises IS DISMISSED; and

12. IT IS FURTHER ORDERED, That the supplement to petition to enlarge issues, filed April 17, 1974, by Deep South Radio, Inc. IS DISMISSED; and

13. IT IS FURTHER ORDERED, That the petition for official notice, filed May 3, 1974, by Circuit Broadcasting Company IS GRANTED; and

14. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed January 4, 1974, by Deep South Radio, Inc. IS GRANTED

[8] The cases cited by Deep South are clearly inapposite. In *Western Communications, Inc., supra*, a financial issue was added because, among other things, the applicant's ability to supply the collateral as a condition precedent to the loan was in question. In *Jackson Missouri Broadcasting Company, supra*, and *Louis Vander Plate, supra*, the bank letters had expired by their own terms and also failed to state the terms of repayment and security. Such is not the case here.

to the limited extent indicated herein, and IS DENIED in all other respects; and

15. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed January 4, 1974, by Circuit Broadcasting Company IS GRANTED to the limited extent indicated herein and IS DENIED in all other respects; and

16. IT IS FURTHER ORDERED, That the Commission's Order (38 FR 34906, published December 20, 1973) designating the above-captioned applications for hearing is amended to provide that final action on the application of James A. McCullough Enterprises will be withheld until dispositive action is taken with respect to the applications of WSWG AM–FM in Docket No. 20025.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER LEONIDAS P. B. EMERSON

I dissent to the refusal to add an issue to determine the facts and circumstances surrounding the asserted disposition by Mr. James A. McCullough of his ownership interests in broadcast stations in Hattiesburg and Greenwood, Mississippi, and Helena, Arkansas. In my view, James A. McCullough Enterprises has not clearly established that Mr. McCullough has in fact relinquished all incidents of ownership in the licensees of these other stations.

FCC 74-778

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DICK BROADCASTING CO., INC., OF TENNESSEE (ASSIGNOR), ROBERT A. MAYER (ASSIGNEE) For Assignment of License of WMOC, Chattanooga, Tenn.	File No. BAL-7859
and	
ROBERT ALLEN MAYER (ASSIGNOR), C. ALFRED DICK (ASSIGNEE) For Assignment of License of WPJD, Soddy-Daisy, Tenn.	File No. BAL-8008
and	
DICK BROADCASTING CO., INC., OF TENNESSEE (WMOC), CHATTANOOGA, TENN. For Renewal of License	File No. BR-1233

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 26, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has for consideration (a) the above-captioned applications; (b) a petition to deny filed on behalf of Jay Sadow (Sadow), licensee of standard broadcast station WRIP, Rossville, Georgia; (c) pleadings in opposition and reply; (d) motions, filed by Sadow, to defer further pleadings and to dismiss the WMOC application, which requests have been rendered moot; (e) supplements to the petition to deny; and (f) pleadings in opposition and reply thereto.

2. The application to assign the license of standard broadcast station WMOC (1450 kHz; 1 kW-D, 250 W-N) from Dick Broadcasting Company, Inc. of Tennessee (Dick Broadcasting) to Robert A. Mayer (Mayer) was filed on March 23, 1973. In the contract for sale, the parties agreed that the application was contingent upon the Commission's consent to the assignment of license of standard broadcast station WPJD (1550 kHz; 250 W-D),[1] Soddy-Daisy, Tennessee, from Mayer to a third party. Since WPJD and WMOC are only fifteen miles apart and have overlapping 1 mv/m contours, Mayer is required, under the duopoly provision of the multiple ownership rule (section 73.35 of the Commission's rules), to dispose of his interest in WPJD before he can acquire station WMOC. On May 20, 1973, an applica-

[1] An application for a construction permit to increase the power of WPJD to 1 kW (major change) was filed on January 14, 1974, and is currently pending.

tion was filed to assign the license of WPJD to Trinity Baptist Church, which application was dismissed at the request of the parties on August 8, 1973. Subsequently, on October 3, 1973, the above captioned application to assign the station's license to C. Alfred Dick was filed. Mr. Dick, who has no ownership interest in WMOC, is an officer, a director and general manager of the station, and is the brother and brother-in-law of WMOC's principal stockholders. Mr. Dick's financial ability to purchase WPJD from Mayer, which in turn will enable Mayer to purchase WMOC from Dick Broadcasting, is the result of loans and guarantees from Dick Broadcasting and Mr. Dick's brother, James.

3. Sadow's standard broadcast station WRIP (980 kHz; 500 W–D, D–A) is licensed to Rossville, Georgia, a suburb of Chattanooga and provides principal city coverage to both communities. Sadow bases his claim to standing to oppose the assignment of the WMOC license on the fact that WRIP competes for listeners and advertising revenues with stations serving Chattanooga. Regardless of whether Sadow possesses standing to file a petition to deny, we will consider the substantive questions raised by him on their merits—Compare *Clay Broadcasters, Inc.*, 21 RR 2d 442 (1971) with *Broadcast Enterprises, Inc. v. FCC*, 390 F. 2d 485, 12 RR 2d 2001 (1968). The various supplements to Sadow's original petition to deny were occasioned by the submission of amendments to the application for the sale of WMOC and by the filing of the application to assign the WPJD license to C. Alfred Dick. The supplemental petition which presents Sadow's principal objections to the grant of the WMOC and WPJD applications was filed on January 8, 1974, over three months from the filing of the current WPJD application. Although good cause has not been shown for the delayed filing of this supplemental pleading, because of the changed circumstances arising from the filing of the WPJD application and the submission of numerous amendments to the original application of WMOC, we will also consider the supplemental substantive questions raised therein.

4. Mayer proposes to program WMOC with basically a religious format which will consist of gospel programs, gospel music and religious talk.[2] Sadow contends that Mayer's proposed service will essentially duplicate that presently offered by WRIP; that this will fractionalize WRIP's already limited and specialized audience, resulting in an impairment and diminishment of WRIP's ability to serve the public; that Mayer's service will not be adequate to compensate for any loss of program service from WRIP; and that the overall effect will be a degredation of program service to the public. Sadow, in effect, is alleging that the Chattanooga market cannot support another religious broadcast service and is attempting to raise a *Carroll* issue. *Carroll Broadcasting Co. v. FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958). In this instance it is not necessary to reach the question of whether *Carroll* has any applicability to assignment and transfer proceedings,[3] since Sadow has not even attempted to support his

[2] "Gospel" will comprise 85% of the broadcast week, "Black programming" 28%, and news, 8%. The "Black programming" percentage is described as being part of the "Gospel" and news percentages and will be broadcast 28 hours per week.

[3] See *Westminster Broadcasting Corporation v. FCC*, 459 F. 2d 1356 (1972), *Valley Telecasting Co., Inc. v. FCC*, 338 F. 2d 278 (1964).

allegations by the factual showings necessary to raise such an issue. No data has been submitted concerning the economics of broadcasting in the market which would tend to show that Chattanooga cannot support Mayer's proposal without a loss or degradation of program service to the public. Sadow's vague, generalized and conclusory allegations of anticipated diminution of service are insufficient to present substantial and material questions of fact requiring a hearing.[4]

5. Until November 4, 1973, WMOC's program format was described as "good music" or "middle of the road." Sadow initially contended that WMOC was only one of two stations in the market with this type of format; that, in addition to WRIP, four other stations provide a religious format; and that Mayer's proposal would, therefore, not contribute to the diversity of listener choices available, and, in fact, would diminish the diversity of format choices. A review of stations serving the Chattanooga market, utilizing Standard Rate and Data Service and their most recent renewal applications, reveals, however, that Chattanooga is provided with a broad diversity of entertainment formats and that six (WDEF; WDEF–FM; WDXB; WFLI; WGOW; WYNQ) of the twelve commercial radio stations have formats described either as "standard popular," or "contemporary music," or "middle of the road," or "contemporary standard." Two stations, WDOD and WDOD–FM, currently program primarily a country and western format and one station, WNOO, provides a Black-oriented program service with popular, rhythm and blues, spiritual and gospel music. Although five or six stations utilize a primarily religious music format, only Sadow's AM and FM stations and WMOC, with its current format of modern gospel music, are commercial stations, the remainder being noncommercial educational FM stations Sadow has not submitted any information which would indicate that WMOC's former format was unique and that its music was not available on other stations in the area. On November 4, 1973, WMOC changed its music format to "modern gospel," similar to that proposed by Mayer, and is the only fulltime AM station in the area with such a format. It is interesting to note that Sadow, with his allegations that the area has an overabundance of gospel music stations, notified the Commission that, as of March 7, 1974, his FM station in Rossville was switching its format from country and western to gospel because another station in the market discontinued gospel programming, thereby "creating a public need." Sadow apparently recognizes the popularity of gospel music programming in the Chattanooga market and the right of a licensee to reasonably exercise its own judgment, in most situations, with respect to the entertainment format to be provided to the public.

6. As noted, Dick Broadcasting, on November 4, 1973, and during the pendency of its application to assign the license of WMOC and Sadow's pleadings relative thereto, changed the entertainment format of the station from "good music" or "middle of the road" to "modern gospel" music, basically the same format proposed by Mayer. However, no changes were made in the station's news and public affairs programming, and the change was prompted, according to Dick Broadcasting's letter of October 18, 1973, by the fact that the area recently

[4] *WLVA, Inc. v. FCC*, 459 F. 2d 1286, 23 RR 2d 2081 (1972).

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was being provided with "good music" and "middle of the road" programming from two other stations (WYNQ (FM) and WDEF) and that the latest nationally recognized audience survey indicated that relatively few individuals were listening to WMOC's musical programming. Sadow contends that WMOC's format was changed to that proposed by Mayer so as to eliminate the diversity and degradation of service arguments advanced by WRIP against Mayer's proposal and that Dick Broadcasting permitted Mayer's private interests in acquiring WMOC to dictate the nature and quality of its program service and thereby, at the least, abandoned or subordinated its public interest obligations to Mayer's private interests. Sadow further contends that a serious question is also presented with respect to whether a premature transfer of control to Mayer has occurred. We do not agree. Sadow's contention that the timing of the format change and the circumstances under which it occurred raise questions with respect to the motivation behind the change is based on mere speculation and is not supported by specific allegations of fact sufficient to raise a prima facie case of premature transfer of control. Sadow, in numerous instances, has referred to the fact that Dick Broadcasting has been operating at a loss and it has been indicated that gospel music is a popular entertainment format in the Chattanooga area. These facts alone would justify the format change. Furthermore, Dick Broadcasting has stated that the decision to change format was "influenced and made in its entirety by the management of WMOC, and no one [had] the knowledge of this proposed change [as of the date the Commission was notified], other than the management and a few members of the staff of WMOC." Mayer has also sworn that he was unaware of the format change until it was implemented. No facts have been alleged which would indicate that there were any agreements or understandings between Mayer and Dick Broadcasting which would have the effect of relinquishing control of WMOC to Mayer or that Mayer in any way, has assumed control or has attempted to control WMOC's programming policies. Furthermore, there appears to be sufficient justification for the format change and, on the facts before us, we cannot conclude that a question of premature transfer of control has been presented or that Dick Broadcasting has ignored its public interest obligations.

7. Sadow alleges that Mayer's sale of WPJD in order to acquire WMOC constitutes trafficking and that C. Alfred Dick's proposal to acquire WPJD is merely for the purpose of accommodating the financial interests of Dick Broadcasting and, as such, also represents trafficking in a station license. Sadow claims that Mayer's proposal represents an example of "trading up," i.e., the selling of one station to finance the purchase of another in a larger market. Although Sadow notes that the Commission has determined that "trading up," per se, does not constitute trafficking, he reasons that since Mayer held the license for WPJD for less than three years at the time the application to assign the license of WMOC was filed, and since the purchase and financing of WMOC is contingent upon Mayer's disposal of WPJD, it can be concluded that he acquired WPJD for the primary purpose of selling it at a profit so as to finance the acquisition of a more attractive broadcast property. We do not believe, however, that the factors noted by

Sadow lead either to the conclusion, or present substantial evidence, that the sale of WPJD represents trafficking. At the time applications were filed for the sale of WPJD, Mayer held that station for more than three years, so that a waiver of section 1.597(a) of the rules (three-year rule) is not required. Also, since the WMOC application revealed that the purchase of that station was contingent upon Mayer's disposal of WPJD, we cannot find that Mayer was lacking in candor, as Sadow contends, with respect to his intent to sell WPJD. Finally, no other factors have been alleged which would indicate that WPJD had been acquired and/or operated primarily for the purpose of selling it at a profit. There is no evidence that Mayer had previously engaged in the practice of "trading up" for large profits, and it has been held that where an isolated instance of "trading up" with respect to one station exists, and where no allegations have been made that the station was operated contrary to the public interest during the licensee's ownership, the mere fact that the station is sold in order to move up to a larger market does not provide a basis upon which to predicate a conclusion of trafficking.[5]

8. Sadow further characterizes the assignment of the license for WPJD as "nothing more than a ploy" or "scheme" by which Mayer can acquire WMOC and that the relationship between the sale of WPJD from Mayer to C. Alfred Dick and Mayer's acquisition of WMOC from Dick Broadcasting raise trafficking questions. Sadow notes that Dick Broadcasting was and is incurring substantial losses in the operation of WMOC and that these losses will continue until the acquisition of the station by Mayer. He points out that Mayer cannot acquire WMOC unless he disposes of WPJD and that several of Mayer's attempts to sell WPJD were unsuccessful "until C. Alfred Dick appeared on the scene." He further, and correctly, states that Mr. Dick's financial ability to purchase WPJD is the result of a $175,000 loan from Dick Broadcasting. In this way, Sadow contends, Dick Broadcasting not only assures Mr. Dick's ability to purchase WPJD, but also assures itself of a buyer who will pay $500,000 to acquire WMOC. He concludes that the entire transaction raises a question as to whether C. Alfred Dick's acquisition of WPJD is for the purpose of his operating the station in the public interest or is merely a device for delivering a buyer for WMOC to Dick Broadcasting. The fact that C. Alfred Dick may not have been initially interested in purchasing WPJD and that he has a substantial interest in seeing a sale of WMOC consummated,[6] does not, in our opinion, negate Mr. Dick's intention to own and operate WPJD in the public interest. In the application to

[5] *WHUT Broadcasting Company, Inc.*, et al., 20 F.C.C. 2d 1097 (1969).

[6] From October, 1961, to January, 1969, Mr. Dick received very little compensation for his services as general manager of WMOC. To compensate for his services and for his role in negotiating the WMOC sales contract, Dick is receiving $175,000 plus the amount of a prior debt to the corporation, for a total of $229,541, to be paid to Dick out of the proceeds of the sale of WMOC to Mayer, i.e. he will receive a proportionate share of each of the monthly payments Dick Broadcasting receives from Mayer. Dick Broadcasting will loan Dick $175,000 at the time of closing on the purchase of WPJD, to be repaid at such time as Mr. Dick receives the payments from the corporation on the additional compensation arrangement, i.e. at such times that Dick Broadcasting receives payments from Mayer. The obligation of Mr. Dick to the corporation, and the obligation of the corporation to Mr. Dick, will, therefore, be self-liquidating. Thus, each obligation provides adequate security for the other so that no additional security is required, and any interest charge assessed on either obligation would be matched by the same interest charge on the other obligation, thereby completely offsetting such charges.

assign WPJD to Mr. Dick, Mr. Dick states that he desires to acquire the station so as to ". . . own and operate a radio station of my own . . ." Mr. Dick is the general manager of WMOC and has been associated with the station since October of 1961. Although these transactions are interrelated and mutually contingent, in view of Mr. Dick's broadcasting experience and with the sale of WMOC likely, there does not appear to be any basis for questioning his motives for seeking to acquire a broadcast facility of his own in the area in which he resides and we do not consider the transaction to be contrary to our policies and rules or contrary to the public interest. C. Alfred Dick's intention to become a broadcast licensee in Soddy-Daisy and to serve the public interest is further supported by the fact that he is an applicant for a new FM broadcast station for that community.[7] Mr. Dick has sufficiently demonstrated that he will operate WPJD in the public interest and we cannot find that significant facts have been presented which show that his primary interest is to acquire the station so as to sell it at a profit, or for the purpose of merely facilitating the sale of WMOC. There have been no attempts to disguise or to mislead the Commission with respect to the nature of these transactions. This information will become part of the record of WPJD, and will be carefully considered in the event Mr. Dick attempts to dispose of that station or fails to operate it in the public interest. At this time, Sadow's conjectural arguments fail to present a prima facie case of trafficking.

9. Finally, Sadow questions the financial ability of Mayer to acquire WMOC. Numerous amendments and supplemental data have been submitted concerning Mayer's financing plan and we find that he has adequately demonstrated his ability to acquire WMOC and to operate it for one year. The purchase price for the acquisition of WMOC is $500,000, $10,000 having been deposited in escrow, and $90,000 in cash being due at closing. The sales contract originally provided for a five-year payout on the balance of $400,000, at an annual interest rate of ten percent, the first payment of equal monthly principal and interest payments of $8,498.82 becoming due sixty days after closing. However, the repayment terms provided for in the sales contract have been revised by amendment and Mayer will now exercise an option providing for a moratorium on the payment of principal for a period of nine months after consummation, which will now result in a five-year and nine month payout on the $400,000. Thus, sixty days after consummation, interest payments will become due of $6,666.66, representing two months interest at ten percent on the $400,000 balance, and thereafter, eight monthly interest payments of $3,333.33 and two monthly payments of $8,498.82 (representing principal and interest) will be paid, for a total of $50,331 in principal and interest payments due to Dick Broadcasting in the first year of WMOC's operation by Mayer. Therefore, in addition to the $90,000 due at closing, Mayer will be liable for an additional first-year requirement of $50,331.

[7] In a supplemental pleading, filed May 2, 1974, Sadow summarizes C. Alfred Dick's ability to finance the purchase of WPJD and to acquire and operate a new FM station in Soddy-Daisy. He contends, however, that Mr. Dick has not provided for sufficient funds in his FM application to cover the costs of the comparative hearing which must be held. In that application, Mr. Dick estimates his legal expenses at $10,600, certainly a reasonable amount and an amount in excess of that usually estimated in initial applications for new FM construction permits which must be designated for comparative hearings. Sadow fails to provide any basis upon which to question Mr. Dick's estimate of legal expenses.

10. In 1973, WMOC's operating expenses of $113,033 [8] were substantially greater than its gross revenues. However, its financial picture in 1972, prior to the filing of the assignment application and related employee and operating difficulties occasioned by the impending sale, showed a negative cash flow of less than $10,000. Mayer will be operating WMOC forty-two hours less per week than Dick Broadcasting operated the station in 1973. However, because of Mayer's proposed increase in the percentage of time to be devoted to news and public affairs categories, the actual total time to be devoted to such programming (i.e. approximately twelve hours per week) will be substantially the same as WMOC's past and current operating schedule. No basis exists for finding that Mayer's proposal will result in a significant reduction in service to Chattanooga, and that he will not be able to serve the public interest, as Sadow contends. Furthermore, Mayer urges the Commission not to rely on WMOC's 1973 cash flow position in computing his first-year operating requirements. In support of this request, Mayer has submitted program sponsorship contracts totalling over $75,000 and we find that he has adequately established the availability of at least $62,140 in first-year revenues from this source. The contracts from proposed sponsors for which Mayer is being given credit are supported by data showing that such sponsors have either advertised in past years on Mayer's other stations in amounts comparable to those proposed or that they have had advertising budgets in the past which demonstrate that the amounts for which they are committed can be met. Mayer proposes a first-year minimum operating budget of $42,804, but he has not adequately documented the manner in which he will reduce WMOC's 1973 operating expenses of $113,033 by such a considerable amount. However, we find that he has shown the manner in which WMOC's expenses will be reduced in certain significant categories. With respect to WMOC's 1973 payroll expenses, $36,000 represents payments to principals. Mayer and his proposed general manager, who will actively be involved in the day-to-day operation of WMOC, will not be receiving any salary from that station in the first year. Their salaries will be derived from the revenues of Radio Paradise, the operator of a West Indies radio station owned by Mayer and from Mayer's standard broadcast station WPGD, Winston-Salem, North Carolina, which showed a positive cash flow in 1973. Furthermore, in projecting the cash flow for WMOC during Mayer's first year of operation, WMOC's depreciation and interest expenses, totalling $10,145, can be deducted from the station's total expenses for 1973. Thus, at the least, $46,145 can be deducted from WMOC's 1973 expenses of $113,033 for purposes of computing Mayer's projected cash flow. Accordingly, we find that with revenues of $62,140 and expenses of $66,888, WMOC's projected cash flow loss will amount to $4,748.

11. To summarize, Mayer will require the following amounts to purchase and operate WMOC for one year: down payment on purchase price, $100,000; first-year principal and interest payments to Dick Broadcasting, $50,331; first-year principal and interest payments on a

[8] Dick Broadcasting has consented to the public disclosure of data contained in its 1973 Form 324 for WMOC.

personal loan from Mr. Charles T. Vlaun, $19,500; and a projected negative cash flow of $4,748, for a total of $174,579. To meet this requirement, Mayer has established the availability of funds in the amount of $185,000, as follows: cash in escrow, $10,000; proceeds from the sale of WPJD, $75,000; and a personal loan from Mr. Vlaun of $100,000. Accordingly, Mayer has adequately demonstrated his financial qualifications.

12. In view of the foregoing, we find that specific allegations of fact have not been presented which raise substantial and material questions warranting a hearing, and that Mayer is legally, financially and otherwise qualified to acquire WMOC; that C. Alfred Dick is legally, financially and otherwise qualified to acquire WPJD; and that a grant of both applications will serve the public interest, convenience and necessity. It is noted that the license for WMOC was last renewed on September 29, 1970, for a period ending August 1, 1973, and that its pending application (BR–1233) for renewal of license, filed May 2, 1973, is deferred because of problems with Dick Broadcasting's ascertainment of community needs showing. Inasmuch as these problems will be obviated by a grant of the application to assign WMOC to Mayer, the application for renewal of license will be granted simultaneously therewith.

13. Accordingly, IT IS ORDERED, that the petition to deny filed by Jay Sadow IS DENIED, and the applications for (1) the renewal of license for WMOC (BR–1233); (2) the assignment of license for WMOC (BAL–7859); and (3) the assignment of license for WPJD (BAL–8008), ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*

FCC 74R-267

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
EASTERN MICHIGAN UNIVERSITY (WEMU (FM)), YPSILANTI, MICH.	Docket No. 19911 File No. BPED-1648
For Construction Permit To Make Changes	
THE REGENTS OF THE UNIVERSITY OF MICHIGAN (WCBN-FM), ANN ARBOR, MICH.	Docket No. 19912 File No. BRED-528
PLYMOUTH COMMUNITY SCHOOL DISTRICT (WSDP-FM), PLYMOUTH, MICH.	Docket No. 19913 File No. BRED-537
For Renewal of Licenses	
In Re Request of Eastern Michigan University for an Order To Show Cause Directed to	
THE REGENTS OF THE UNIVERSITY OF MICHIGAN (WCBN-FM), ANN ARBOR, MICH.	Docket No. 19914

MEMORANDUM OPINION AND ORDER

(Adopted July 24, 1974; Released July 25, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The above-captioned applications were designated for hearing by the Commission by Memorandum Opinion and Order released January 10, 1974, FCC 74-17, 39 FR 2796. By Memorandum Opinion and Order released March 14, 1974, FCC 74R-89, 45 FCC 2d 830, the Review Board granted in part and denied in part a petition for modification of issues filed by the Broadcast Bureau on January 22, 1974. Now before the Review Board is a petition for modification of issues, filed March 27, 1974, by the Regents of the University of Michigan (hereinafter Regents) requesting that Issue 1 in this proceeding be modified,[1] and that the burden of proceeding and the burden of proof be shifted from Gross Telecasting, Inc. (hereinafter Gross) to Eastern Michigan University (hereinafter Eastern).[2]

2. A history of this proceeding is set forth in the Board's Memorandum Opinion and Order and the Commission's designation Order, noted *supra*, and need not be fully repeated here. Briefly, petitioner

[1] Issue 1 reads as follows: 1. To determine whether the operation of station WEMU (FM) as proposed or the operation of station WCBN-FM on channel 202 (88.3 MHz), or both, would cause objectionable interference to direct reception by the public of the signals of television station WJIM-TV, channel 6, Lansing, Michigan, and, if so, the areas and populations which would be affected thereby and the availability of CBS television network programming from other sources.

[2] The Board also has before it for consideration the following related pleadings: (a) statement in support of petition for modification of issues, filed on April 5, 1974, by Gross; (b) opposition, filed April 8, 1974, by the Broadcast Bureau; (c) opposition, filed April 9, 1974, by Eastern; and (d) reply, filed April 15, 1974, by Regents.

alleges that since Eastern is the moving party in seeking to modify its existing facilities, it should bear the burden of proceeding and the burden of proof in resolving the question of whether objectionable interference would be caused to the reception of Station WJIM–TV, Lansing, Michigan (Issue 1) as a result of the modification of its own facilities and the requested change in frequency of Regents' station.[3] Regents also requests that Issue 1 be modified, since the Commission, in its designation Order, recognized that there appeared to be no disagreement as to whether there would be interference to WJIM–TV and therefore the threshold question of determining whether such interference exists should be deleted from the issue.

3. In light of Gross' representations that it will not introduce any evidence under Issue 1, the Board will consider Regents' request to shift the burdens under Issue 1 on its merits. We fail to see, however, how Gross' representations or the Board's recent action, noted *supra*, constitute good cause for Regents' request to modify the wording of Issue 1. Moreover, we are of the view that no useful purpose would be served by granting the requested modification, and, therefore, Regents' request in this regard will be denied. With respect to the burdens under Issue 1, the Board agrees with Regents that since it is Eastern which seeks modification of its facilities, Eastern should bear the burden of proceeding and the burden of proof under Issue 1. We will, therefore, grant Regents' request to modify the burden under Issue 1 and place the burden of proceeding with the introduction of evidence and the burden of proof upon Eastern Michigan University.

4. Accordingly, IT IS ORDERED, That the petition for modification of issues, filed March 27, 1974, by the Regents of the University of Michigan, IS GRANTED to the extent indicated herein; in all other respects, the petition IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] In order for Eastern to implement its proposed modification, Regents will have to change frequencies for WCBN–FM.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
BARRY J. WALDMAN, RYDAL, PA.
Concerning Fairness Doctrine Re Station WCAU–TV, Philadelphia, Pa.

JULY 24, 1974.

MR. BARRY J. WALDMAN,
1306 Frog Hollow Road,
Rydal, Pa.

DEAR MR. WALDMAN: This is in reference to your letter of May 6, 1974 wherein you state that station WCAU–TV, Philadelphia, Pennsylvania violated the fairness doctrine in the broadcast of its 6:00 p.m. news on March 4, 1974. You refer to a letter you sent to the licensee on March 6 in which you contended that the station's coverage of a controversial sewer project in Rydal, Pennsylvania, was "extremely biased"; that although your wife, speaking as an opponent of the proposed project, was interviewed by WCAU–TV, the proponents of the project were afforded considerably more time to present their opinions; and that your wife's more cogent arguments were not broadcast, but rather the station's presentation had the effect of making her position appear foolish. You asked the station for "the opportunity to have additional television time to fairly present [your] position under the fairness doctrine."

You previously had written to the Commission on April 23 on this matter and stated that at that point WCAU–TV had failed to respond to your March 6 letter. You requested that this failure be raised at a previously scheduled comparative hearing concerning WCAU–TV's license. We requested by letter dated May 1 that the licensee state whether or not it has responded to your complaint and, if not, to give reasons therefor.

In your May 6 letter, you enclose a copy of WCAU–TV's reply dated April 30, wherein the station states its position that it did not violate the fairness doctrine and that contrary opinions concerning this matter had been presented in an appropriate fashion, fully informing the public of the different points of view. The licensee concluded that your wife had been able to present adequately her position over WCAU–TV, and denied your request for additional air time.

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

However, under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy *does not require that "equal time" be afforded for each side*, as would be the case if a political candidate appeared on the air during

his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views *in its overall programming*, which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance." (Fairness Primer).

The licensee has considerable discretion in fulfilling its fairness obligations to afford "reasonable opportunity for the presentation of contrasting views" on the issues which it airs, and the Commission will review licensee judgments in the exercise of that discretion (including judgments as to what viewpoints have been or should be presented, the format and spokesmen to present the viewpoints, etc.) only to determine whether the licensee has acted reasonably and in good faith. See *Fairness Primer*, 29 Fed. Reg. 10415, 10416. Thus, the complainant must set forth with some particularity how and why the licensee has been unreasonable or acted in bad faith in exercising his discretion.

Although your complaint refers to the alleged "disparity of time allowed to respective parties" and to the "basic unfairness of the report," nowhere do you describe the exact manner in which your wife's position was treated unfairly by WCAU–TV. As stated earlier, the licensee is not obligated to afford "equal time" to the various sides of a controversial issue, and thus disproportion in time allotment is not per se unreasonable. Further, even if we assume, *arguendo*, that there was such disparity on the program in question, the Commission has, in the past, stated that the licensee's fairness doctrine performance is to be judged within the context of its overall programming, rather than by individual broadcasts, and you have not indicated the reasons for your belief that WCAU has failed to present contrasting points of view on the sewer project issue, in its other programming.

In view of the foregoing no action is warranted at this time on your complaint. Should you provide the Commission with specific information that the licensee, in its overall programming has not afforded reasonable opportunity for contrasting views, we will give this matter further consideration.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MARY JO BRADLEY, PITTSBURGH, PA.
Concerning Fairness Doctrine Re Station
KDKA, Pittsburgh, Pa.

JULY 24, 1974.

MRS. MARY JO BRADLEY,
P.O. Box 7928,
Pittsburgh, Pa.

DEAR MRS. BRADLEY: This is in response to the several complaints you have filed with the Commission regarding two separate matters to which you feel the fairness doctrine and the Commission's policy in regard to news slanting and distortion are applicable. Your first complaint, dated April 24, 1974,[1] concerns the "Open Mike" program broadcast over radio station KDKA, Pittsburgh, Pennsylvania. You state that the licensee has censored opposing points of view by screening calls it receives on its program; that, even if lawful, the licensee should be obligated to publicly announce its practice of screening comments prior to broadcast. You also state that the program's moderator, Mike Levine, has been rude to the point of terminating the conversation before the caller can fully express a contrasting opinion, and that specifically, on March 5, 1974, Levine continually cut off callers expressing contrasting opinions concerning "a responsible news media," while airing favorable comments similar to his own in violation of the fairness doctrine. You further contend that under Commission rules it is impossible for an individual to gather sufficient evidence of licensee wrongdoing to satisfy the requisite standard of proof in fairness doctrine cases, since licensees are typically uncooperative.

In a letter to you dated March 12, 1974 the licensee had responded to your complaint to it by stating that it employed a professional screener to schedule calls for their relevancy to the current discussion and the repetitiveness of similar viewpoints in order to increase the probability that varying views will be aired. The licensee cited the scarcity of time as the reason for not airing all the calls received.

The licensee further responded to you by letter dated April 9, stating that the issue of "media responsibility" has been discussed and will continue to be discussed over KDKA; that the station does not censor or repress discussion of any topic during the "Open Mike" program; and "that your description of the alleged incident on this edition of

[1] In response to your letters to the Commission prior to April 24, you were sent information explaining the fairness doctrine, the procedures to follow in filing fairness doctrine complaints, and the Commission's policy with respect to allegations of news distortion.

'Open Mike' is exaggerated and fails to take into account the dimensions of that program and KDKA's total programming on a daily basis."

Your second complaint, dated May 15, 1974, concerns CBS news reporter Dan Rather's questioning of President Nixon at his March 19 press conference during the National Association of Broadcasters' convention in Houston.

The Commission has in the past pointed out that "open-mike" programs render a significant public service by providing a forum for ordinary citizens to express publicly their views about important issues of the day and that the telephone interview format has generally been most successful where licensees have kept close control over the way the programs are conducted. *In re Licensees Control of Telephone Interview Programs*, 35 Fed. Reg. 12132 (1970). In attempting to achieve a reasonable balance between opposing views concerning controversial issues on "open-mike" or "call-in" programs, some licensees have adopted the prescreening procedure of asking callers the general tenor of their intended comments so as to avoid the presentation of a succession of participants who have essentially the same thing to say. Such procedures also avoid domination of the open-mike programs by organized groups of callers representing one particular point of view. The Commission neither requires nor prohibits these practices. *In re Licensee Control of Telephone Interview Programs, supra.* Editorial control of these programs does not infringe on the public's freedom of expression as long as the ultimate goal is ". . . the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day . . . It is the right of the public to be informed, rather than the right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." *Report on Editorializing*, 13 FCC 1246, 1249 (1949).

As stated in our previous letters to you, the Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming. We also explained that under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it must afford reasonable opportunity for the presentation of contrasting views; that this policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign; that it is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue; and that the Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

You have furnished us with information which tends to support the conclusion that the licensee has in fact made an effort to present contrasting opinions regarding the news media. Thus, in your letter of April 24, you state that KDKA has made at least one attempt to pre-

sent a guest critical of the media, Rabbi Baruch Korff of the Citizens Committee for Fairness to the Presidency. You also stated in your April 24 letter that since your complaint was filed with the Commission you have heard callers on KDKA who have voiced criticism towards the news media; that you were able to discuss media responsibility on "Open Mike" and on "The John Signa Program," which immediately follows the Levine show over KDKA; that the Signa program affords a caller an opportunity to discuss any issue he feels is noteworthy; and that the licensee has begun to present comments from listeners critical of the news media during the "Open Mike" program, "with Mr. Levine as the host, as well as those filling in for him." On the basis of the information before the Commission it cannot be concluded that KDKA failed to present contrasting opinions regarding the media in its overall programming.

With regard to your second complaint, you stated that Rather, while questioning the President, "created a controversial situation," and that this incident was suppressed by CBS as it was not included in CBS' news coverage or over KDKA–TV, the CBS affiliate in Pittsburgh. You claim that CBS "acted irresponsibly and deliberately to attempt to falsify the news", and that in presenting promotional ads "praising" its own news staff and that of KDKA, while suppressing anything critical of CBS News, it violated the fairness doctrine.

With respect to your allegation that CBS attempted to falsify the news, in *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969), the Commission stated its intention to take action only after receiving substantial extrinsic evidence of deliberate distortion of news reports or staging of news events by a licensee or network. As an example of such evidence, the Commission cited testimony from "insiders" or persons who have direct personal knowledge of such an attempt to falsify the news. As you have failed to present extrinsic evidence relating to news distortion or slanting, we are unable to take action on this aspect of your complaint.

Insofar as you furnish no specific examples of network support of its news staff, we are unable to determine that CBS violated the fairness doctrine. However, the Commission has in the past stated that network advertisements "praising" its news department do not constitute advocacy of one side of a controversial issue of public importance within the scope of the fairness doctrine. See *Letter to Anthony R. Martin-Trigona*, 19 FCC 2d 620, 621–622 (1969). The Commission stated in that ruling:

> The fairness doctrine is designed to assure a full and fair opportunity for the American people to be informed on controversial issues of public importance. The strained attempt to apply it to institutional or promotional advertisements of this nature must be rejected as not promoting that fundamental purpose but rather as being disruptive of the commercially based broadcast system.

Thus, as we have received no evidence of either news suppression or distortion, or of a violation of the fairness doctrine, no action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission,

Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
for Chief, Broadcast Bureau.

FCC 74-799

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (LAKE CITY, MULLINS, CONWAY, AND KINGSTREE, S.C., AND FAYETTEVILLE AND FAIRMONT, N.C.	Docket No. 19827 RM-2065, RM-2279

REPORT AND ORDER

(Proceeding Terminated)

(Adopted July 17, 1974; Released July 26, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has before it for consideration the proposal (RM-2065) to assign Channel 261A as a first FM assignment to Lake City, South Carolina, by substituting Channel 252A for Channel 261A at Kingstree, South Carolina, concerning which a Notice of Proposed Rule Making was released herein on September 24, 1973 (FCC 73-980, 38 Fed. Reg. 27086), in response to a petition of Coastline Broadcasting Company (Coastline), licensee of AM Station WJOT (daytime-only), Lake City.[1] Since the Kingstree Channel 261A assignment is occupied by Station WDKD-FM, its licensee, Santee Broadcasting Co., Inc. (Santee) was ordered in the Notice to show cause why its license for Station WDKD-FM should not be modified to specify operation on Channel 252A, as proposed, instead of Channel 261A, with the understanding that it would receive reasonable reimbursement from a Lake City Channel 261A permittee for expenses incurred in the changeover.

2. Also before us is a conflicting proposal to add a second FM assignment to Fayetteville, North Carolina (RM-2279), advanced in the "Comments, Counterproposal and Petition of Stuart W. Epperson", Winston-Salem, North Carolina,[2] timely filed herein on November 15, 1973, before the November 16, 1973, deadline date for filing

[1] Rule making was not instituted, however, on an alternative Coastline proposal to assign FM Channel 296A to Lake City by deleting Channel 296A from Mullins, South Carolina, without replacement, since it would deprive Mullins of its only FM channel, for which an application had been filed (and was granted January 11, 1974, BPH-8340), and the opportunity for a first nighttime aural service.

[2] This pleading was filed and signed in Mr. Epperson's behalf by Earl L. Bradsher, Jr., Atlanta, Georgia, who describes himself simply as a "consultant".

comments on the Coastline Lake City FM proposal.[3] By Public Notice, Report No. 888, released November 28, 1973, interested parties were put on notice that the Epperson Fayetteville proposal would be treated as a counterproposal in this proceeding.

3. The Epperson counterproposal would assign Channel 280A to Fayetteville for a second FM assignment by substituting Channel 263 for Channel 281 (occupied by Station WLAT–FM) at Conway, South Carolina (which would preclude the assignment of Channel 261A to Lake City, as Coastline proposes herein); substituting Channel 252A for Channel 261A (occupied by Station WDKD–FM) at Kingstree, South Carolina (also required by Coastline's Lake City proposal); assigning Channel 280A (instead of Channel 261A, as Coastline proposes) to Lake City; and deleting Channel 265A (unoccupied[4]) from Fairmont, North Carolina, without replacement, as follows:

City	Channels	
	Add	Delete
Fayetteville, N.C.	280A	
Lake City, S.C.	280A	
Conway, S.C.	263	281
Kingstree, S.C.	252A	261A
Fairmont, N.C.		265A

Since a Show Cause Order had previously been issued with respect to the proposed Kingstree FM assignment change, one was needed only with respect to the proposed Conway FM assignment change. An *Order to Show Cause* was therefore adopted on December 10, 1973, herein, ordering Coastal Broadcasting Company, licensee of Station WLAT–FM, Conway, to show cause why its station license should not be modified to specify operation on Channel 263, as proposed by Epperson, instead of Channel 281, with the understanding that it would receive reasonable reimbursement of expenses incurred in the changeover from a Fayetteville Channel 280A licensee.

4. Before discussing these proposals further, there are preliminary matters to be dealt with. First, there is the matter of the defectiveness of the initial Epperson pleading ("Comments, Counterproposal and Petition of Stuart W. Epperson") containing his Fayetteville proposal, filed and signed in his behalf by Earl L. Bradsher, Jr., "Consultant", and the subsequently filed reply comments, similarly filed and signed in his stead by Mr. Bradsher, insofar as the subscription and verification requirements of our rule (Section 1.52) are concerned. A petitioner may, of course, enlist outside assistance from anyone

[3] The deadline dates originally specified in the rule making notice herein for filing comments (and submitting counterproposals) and reply comments (including comments on counterproposals) were November 2, 1973, for comments and November 12, 1973, for reply comments. At the request of Earl L. Bradsher, Jr. (telegram of November 2, 1973, supplemented by letter, received November 5, 1973), who advised that he and Stuart W. Epperson needed additional time (at least two weeks) to confer and prepare and file a counterproposal herein, we extended the due dates for comments (and counterproposals) to and including November 16, 1973, and for reply comments (and comments on counterproposals) to and including November 28, 1973. (*Order*, adopted November 6, 1973, Mimeo 09370.)

[4] An application (BPH–8884), filed on March 18, 1974, by Carolinas Broadcasting Company, Inc., licensee of AM Station WFMO (daytime-only), Fairmont, is currently pending for the Fairmont Channel 265A assignment.

in preparing a petition and pleadings in rule making and other proceedings. However, Section 1.52 of our rules requires that the original of all petitions, motions, pleadings, briefs and other documents filed with the Commission by a party who is not represented by an attorney shall be signed and verified by the party himself and provides only for a party's authorized attorney to sign them in his stead. Further, Section 1.401(b) of our rules governing rule making proceedings puts petitioners on notice that their petitions for rule making shall conform to the requirements of Section 1.52 of the rules respecting subscription and verification.

5. While a pleading which is not properly signed and verified in conformity with Section 1.52 of our rules may be returned as unacceptable, we decided to overlook this procedural defect in the initial Epperson pleading requesting consideration of its Fayetteville proposal in rule making along with the Coastline Lake City proposal and to treat it as if filed and properly signed and verified by Mr. Epperson himself since it appeared from this pleading that the possible public interest value of his Fayetteville proposal should be explored. However, by letter of November 30, 1973, we notified both Mr. Epperson and Mr. Bradsher that any future filings in this proceeding by Mr. Epperson must be made by him, representing himself, or by counsel that he might retain.[5] Our letter also advised that this directive did not prevent Mr. Epperson from filing on his own behalf, continuing to retain the services of Mr. Bradsher as his consultant, and including material prepared by Mr. Bradsher as part of his pleading. By letter of December 6, 1973, Mr. Bradsher advised that the copies of the aforesaid letter to Mr. Epperson and him containing our directive had been received and that "the Commission will receive promptly from Mr. Epperson a copy of each which he had signed of his Reply Comments in this Docket No. 19842".[6] However, despite our directive, and Mr. Bradsher's assurance, the previously submitted "Reply Comments of Stuart W. Epperson", filed and signed in his behalf on November 29, 1973, in this docket by Earl L. Bradsher, Jr., as consultant for Mr. Epperson, were not resubmitted by Mr. Epperson *pro se*, or by his attorney. Nor have any other pleadings or communications from Mr. Epperson *pro se* or his attorney been filed in this docket or, it appears, in Docket 19842 either. In view thereof, and considering also that good cause has not been shown for the filing of his reply comments after the expiration date (November 28, 1973) for filing reply comments in this proceeding and that we are satisfied that his timely filed submission (which although improperly subscribed has been accepted) is sufficient to apprise us of his proposal and position on the conflicting Lake City proposal, we are not accepting his reply submission for consideration.

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[5] The original of the letter was sent to counsel for Coastline (Booth & Freret) who, in an opposition pleading in behalf of Coastline, had raised the question of the acceptability of the Epperson pleading "Comments, Counterproposal and Petition of Stuart W. Epperson" for lack of proper subscription and verification, with copies to Mr. Epperson (% Mr. Bradsher), Mr. Bradsher, Santee Broadcasting Co., Inc. (% counsel), Coastline Broadcasting Co. (% counsel), and Carolinas Broadcasting, Inc. (% counsel).

[6] FM assignment proposals (Cape Girardeau, Dexter, Portageville, Caruthersville, and Malden, Missouri), Notice of Proposed Rule Making, released October 10, 1973, Docket No. 19842 (FCC 73-1035, 38 Fed. Reg. 28573).

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6. There are other late filings to be dealt with also. After consideration, we have decided to adhere to our usual procedure and not accept those filed after the extended November 28, 1973, due date specified for reply comments on the conflicting proposals before us.[7] Coastline's petition to dismiss the untimely "Further Reply Comments" filed by Earl L. Bradsher, Jr. (for himself personally, rather than in behalf of Mr. Epperson as in previous pleadings herein), on January 17, 1974, is granted.[8] As we have repeatedly stressed in FM proceedings, absent a strong showing of justification, we are opposed to reopening such proceedings to the receipt of untimely comments and pleadings not only in fairness to all parties filing timely comments but because, considering the existing substantial backlog of FM assignment cases, this is particularly disruptive to the orderly administration and dispatch of the Commission's business. None of the noted late filings were accompanied by any showing which would constitute justifiable reason for their lateness. Since it also appears that the extended time provided for comments and reply comments herein was sufficient to enable the proponents of the conflicting proposals and other interested parties to make their views known on them in timely-filed comments, and since we are also satisfied that the timely-filed submissions of the proponents and others, including those of parties to whom show cause orders were directed, are adequate to enable us to assess their proposals and that the untimely submissions contain no significant and relevant new matter or argument essential to reaching a decision with respect thereto, we are convinced that this treatment of the late filings herein is clearly justified and required.

7. The timely comments, pleadings and responses to show cause orders issued herein which have been considered in reaching our decision with respect to the conflicting Lake City and Fayetteville proposals include the following:

Comments of Coastline Broadcasting Company (Lake City petitioner).
Comments and Statement of Position of Santee Broadcasting Co., Inc., concerning the Lake City proposal and the show cause order issued to Santee.

[7] These late filings include:
(a) Opposition of WLAT–FM to the Epperson proposal, filed November 29, 1973, by Coastal Broadcasting Company, Conway. (Its position on the Epperson proposal is also stated in its subsequently timely-filed response to the show cause order directed to it.)
(b) Opposition to Comments, Counter Proposal and Petition of Stuart W. Epperson, filed December 26, 1973, by Beasley Broadcasting Company, licensee of Radio Station WFAI(AM), Fayetteville, North Carolina.
(c) Statement in Opposition to Counterproposal of Stuart W. Epperson, filed December 28, 1973, by Wake County Broadcasting Co., Inc., licensee of Radio Station WAKS(AM), Fuquay-Varina, North Carolina. Its pending petition for rule making on a proposal to assign Channel 280A to Fuquay-Varina (RM–2303), filed December 28, 1973, conflicts with the Epperson Fayetteville Channel 280A proposal but cannot be considered herein in conjunction with the Fayetteville proposal since the cut-off date for acceptance of counterproposals for consideration in this proceeding was November 16, 1973.
(d) Statement in Opposition to Counterproposal of Stuart W. Epperson, filed December 28, 1973, by Carolinas Broadcasting, Inc., licensee of Radio Station WFMO, Fairmont. As noted in footnote 4 above, it is an applicant for the Fairmont Channel 265A assignment which would be deleted by the Epperson proposal.
(e) Further Reply Comments, filed January 17, 1974, by Earl L. Bradsher, Jr.
(f) A revised page 13 of his "Further Reply Comments", filed January 18, 1974, by Earl L. Bradsher, Jr.
(g) Telegram in opposition to the Epperson proposal insofar as it would delete the Fairmont Channel 265A FM assignment, received December 26, 1973, from W. B. Webster on behalf of himself and the Fairmont City Council.

[8] The Coastline petition to dismiss was endorsed and supported by counsel (Wade H. Hargrove of Tharrington, Smith and Hargrove) for Carolinas Broadcasting, Inc., Fairmont, in a letter, received January 31, 1974.

Comments, Counterproposal and Petition of Stuart W. Epperson (Fayetteville petitioner).

Opposition to Petition to Add New Channel (Fayetteville proposal), filed by Carolinas Broadcasting, Inc., Fairmont.

Opposition to Comments, Counterproposal and Petition of Stuart W. Epperson, filed by Coastline (Lake City petitioner).

Opposition of WLAT–FM to Order to Show Cause, filed by Coastal Broadcasting Company, Conway.

8. We now turn to the merits of the conflicting Lake City Channel 261A and Fayetteville Channel 280A proposals, each of which our engineering analysis indicates would, but for the other, conform with mileage separation requirements of the rule and be technically feasible if the other proposed changes in existing assignments at Kingstree for the Lake City proposal and at Kingstree, Conway and Fairmont for the Fayetteville proposal are made. Since the Fayetteville Channel 280A proposal would also make it technically feasible to assign Channel 280A instead of Channel 261A, proposed by Coastline, to Lake City, and our decision with regard to the Fayetteville proposal will determine which of these channels would be technically feasible for a Lake City assignment, we shall first consider that proposal.

FAYETTEVILLE CHANNEL 280A PROPOSAL

9. Fayetteville (1970 population, 53,510), the county seat of Cumberland County (1970 population, 212,042), and the central city of the Fayetteville Standard Metropolitan Statistical Area (coextensive with Cumberland County), is located in the southeastern coastal plain area of North Carolina, approximately 55 miles south of Raleigh, the state capital, and approximately 110 miles east of Charlotte, North Carolina.[9] Station WQSM occupies Fayetteville's only FM assignment, Class C Channel 251. The community is also served by four AM broadcast stations, three of which are unlimited-time stations (WFAI, WFLB, WFNC) and the other (WIDU), a daytime-only station.

10. In support of his proposal, Epperson urges that Fayetteville warrants additional FM assignments and stations by all standards: our FM population assignment guidelines provide that communities of 50,000 to 100,000 population may qualify for from two to four FM assignments; the population and economic growth potential[10] and importance of the city and area, as demonstrated by the data accompanying his pleading; and the fact that other North Carolina and South Carolina cities (17 are listed) with lesser population than Fayetteville have been provided with more FM assignments.

11. However, while Fayetteville is of a size to qualify for one or more additional FM assignments, absent countervailing considerations, as Epperson recognizes, there is no easy solution to the problem of providing Fayetteville with an additional FM assignment. Due to existing FM assignments in this southeastern section of the country,

[9] All population figures are from the 1970 U.S. Census unless otherwise indicated.

[10] During the 1960–1970 period, Fayetteville increased in population from 47,106 to 53,510 (a 13.6 percent increase). Cumberland County, during the same period, increased in population from 148,418 to 212,042 (a 42.9 percent increase). Epperson also states that *Sales Management* projects a population of approximately 244,900 for Cumberland County by 1975.

available FM channels which could be assigned to this area are extremely scarce, and there are none which could be assigned to Fayetteville without changing or deleting existing assignments in other communities. Any proposal to add a second FM assignment to Fayetteville must therefore be evaluated from the standpoint of its impact upon existing assignments of other communities, as well as from its preclusionary effect upon new assignments to other communities, with competing needs for FM outlets.

12. Epperson urges that his proposal for providing Fayetteville with a second FM assignment presents a feasible way of accomplishing this objective since it would only require changing the occupied Conway Channel 281 and Kingstree Channel 261A assignments and deleting the unused Channel 265A assignment at Fairmont and would, in addition, permit a new first assignment to Lake City also (Channel 280A) which, although not the same channel requested by Coastline for Lake City (Channel 261A), would also require the same change in the Kingstree Channel 261A assignment. He states that if his proposal is adopted, he will promptly apply for its use at Fayetteville and, if the successful applicant, would be willing to reimburse the Conway Channel 281 licensee for the costs incurred in the changeover. Epperson believes, however, that the successful applicant for a Lake City Channel 280 assignment, whether it be Coastline or someone else, should reimburse the Kingstree Channel 261A licensee for its changeover costs. Coastline, however, in its opposition to the Epperson proposal, contends that since the Epperson Fayetteville (and Lake City) proposal is new and different from its Lake City proposal, it must stand on its own feet, and if adopted, compensation for any and all existing stations' change of frequency required must be borne by the successful Fayetteville applicant, and not by an incidental beneficiary which had not proposed or supported the Epperson proposal.[11]

13. As for justifying removal of Fairmont's only FM assignment to effectuate his Fayetteville proposal, Epperson contends, among other things, that while Fairmont has had an available FM assignment since even before the present FM assignment table was adopted in 1963, no interest has heretofore been displayed in its use for a local station, and that there is nothing in the public record to indicate why Fairmont was assigned an FM channel in the first place since it is a small town (1970 population 2,872) which has a local daytime-only AM station (WFMO) and receives two FM signals of 60 dBu from the two FM stations at Lumberton, North Carolina. Lumberton

[11] Since the change in the Kingstree assignment is required to effectuate both the Fayetteville and Lake City assignment proposals, this raises a question which, however, in view of our decision herein, we need not reach. However, as a matter of information as to how we have handled similar questions of reimbursement, see *In re Doniphan, Missouri, et al.*, 32 FCC 2d 162 (1970), a case involving more than one new FM assignment requiring an operating station to change frequency. We held there that the licensee thereof was entitled to reimbursement of the actual costs of the change from all the parties benefitting (those receiving construction permits on the new assignments made possible by the change) but that he should not have to wait for reimbursement until all of the new assignments were activated. We, accordingly, ruled that he was entitled to reimbursement from the party first receiving a construction permit on one of the new assignments who, in turn, was entitled to *pro rata* reimbursement from the other parties receiving construction permits for the other new assignments. (It would appear that this reimbursement procedure would eliminate any basis for the concern expressed in the pleadings that the reimbursement requirement would pose a delay factor in the activation of the proposed Fayetteville and Lake City Channel 280A assignments, if made.)

(1970 population, 16,961) is located some 10 miles northeast of Fairmont and, in addition to its two FM outlets, has two AM stations, one of which is an unlimited-time operation.[12] In addition, Epperson states that, based on *Roanoke Rapids-Goldsboro, N.C.* criteria,[13] Fairmont could receive FM signals of 60 dBu from three additional stations and a 45 dBu signal from ten stations if their facilities were improved to conform to *Roanoke Rapids-Goldsboro* standards.[14] He states that, in contrast, while a much larger and faster growing community, by the same criteria, would be able to receive FM service of 60 dBu or stronger only from four stations (one of which is the local Fayetteville Class C station) and a 55 dBu signal from five stations.[15]

14. Epperson also contends that any reluctance we might have to intermixing classes of FM assignments in the Fayetteville market by adoption of his Class A proposal for Fayetteville, where only a Class C channel is presently assigned, should be overcome by consideration that a Class A channel is technically adequate to serve Cumberland County (the Fayetteville SMSA) and would provide at least 98 percent of the people in the county, which are projected to number almost a quarter million people by 1975, with a 60 dBu signal from a second local Fayetteville station. He notes also that other North Carolina communities smaller than and near Fayetteville, such as Durham, Goldsboro, Inston, Lumberton, Rocky Mount and Wilmington, have been assigned different classes of FM channels.

15. Insofar as the preclusionary impact of his proposal is concerned, Epperson maintains, based on his study thereof, that, other than Fairmont, the assignment of Channel 280A to Fayetteville would preclude its availability to only one other community with a 1970 population of 1,000 or more—Lillington, North Carolina (1970 population, 1,155), located approximately 22 miles north of Fayetteville, midway between Fayetteville and Raleigh. He points out that Lillington, while without a local outlet, has present and potential FM services available to it from Asheboro, Durham, Raleigh and other stations. However, Fuquay-Varina (1970 population, 3,576), which has no FM assignment and only a daytime-only AM station for a local outlet, is located only about 12 miles north of Lillington and 35 miles north of Fayetteville, and it appears that by judicious

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[12] It is noted that Epperson considers Fairmont as receiving "local services" from the Lumberton AM and FM stations. However, since a broadcast station's primary obligation is to its city of license, with only a secondary obligation to other areas within its field intensity contours, a broadcast station is considered a "local" station only for its city of license, and, as commonly used and applied in our broadcast rules and practice, the "local services" available to a community refer only to those supplied by broadcast stations which designate it as their principal community of license. That is not to say, of course, that broadcast stations are obligated to meet only the local needs of their communities of license, for they also have an obligation to meet the local needs of other communities within their service area, particularly those lacking local outlets of their own.

[13] See *In Re Roanoke Rapids-Goldsboro, N.C.*, 9 F.C.C. 2d 672 (1967).

[14] The 45 dBu signal of FM stations is not taken into account in making FM assignments. The standard used is the 1 mV/m (60 dBu) contour which is considered an FM station's predicted service contour. While a signal of 45 dBu may be adequate for service in rural areas *if* interference-free, as was pointed out in our *Roanoke Rapids-Goldsboro* decision, the spacings we have adopted for FM assignment in most cases subject such signals to interference and limit adequate service of stations to signals closer to 60 dBu.

[15] It is to be noted that Epperson considers a 45 dBu signal adequate for service to Fairmont but a 55 dBu signal necessary to serve Fayetteville because of its larger size. However, as noted in footnote 14 above, the standard is the 60 dBu signal and it is applied to all communities, regardless of size. (If the same 45 dBu criteria were applied to Fayetteville, it, as well as Fairmont, would have 10 potential FM services available, with one of them from the local Fayetteville station.)

selection of a transmitter site Channel 280A would be technically feasible for assignment and use there if not precluded by a Fayetteville Channel 280A assignment.[16] While Epperson states that his Fayetteville Channel 280A proposal would, on the other hand, permit use of Channel 280A at sites in Brunswick, New Hanover or Pender counties in North Carolina and would also enlarge the area in which Channel 261A might be assigned on the coast south of Charleston, South Carolina, he mentions no communities in these areas of a size to possibly have need of an FM outlet, and there appear to be none of any size.

16. In its comments opposing the Epperson Fayetteville proposal, Carolinas Broadcasting, the licensee of the Fairmont daytime-only AM station (WMFO), states that, since the existing Fairmont Channel 265A assignment offers Fairmont its only hope for a full-time local broadcast service, it is strongly opposed to the deletion of the channel from Fairmont in order to provide Fayetteville, which already has three unlimited-time AM stations, a daytime AM station, and an unlimited-time FM station, with another FM assignment. It also informs that it has been engaged in preparing an application to file for a new FM station to serve Fairmont on Channel 265A [which it thereafter filed on March 18, 1974 (BPH–8884)]. Coastline, in its opposition, stresses that Epperson's argument that the Fairmont Channel 265A assignment lies fallow is demolished by the comments of Carolinas Broadcasting herein informing of its plans to apply for the channel.

17. Coastal Broadcasting, the licensee of the Conway Channel 281 station (WLAT–FM) that would be required to change over to operation on Channel 263 under Epperson's Fayetteville proposal, in its response to the show cause order directed to it in the matter, states that it is opposed to the order because, among other reasons, Epperson's Fayetteville proposal would delete Fairmont's only FM assignment and preclude it from having a first full-time aural broadcast outlet. It too calls attention to the opposition pleading herein of Carolinas Broadcasting which given notice of its plans to apply for authority to use the Fairmont Channel 265A assignment for a new FM station there. If required to change the operating frequency of its Conway Channel 281 station, Coastal states that it would be necessary to modify the equipment it uses in connection with the SCA it has to serve about 65 establishments within 40 miles of Conway. It also informs that construction permit to increase power of its Conway station (BPH–8264) on which construction is being delayed because of Epperson's proposal herein which would require a change in its operating frequency and that it is concerned that the delay will result in an increase in its costs for new equipment.

18. Since Station WDKD–FM at Kingstree would be required to shift from operation on Channel 261A to Channel 252A under both Coastline's Lake City proposal and Epperson's Fayetteville (and Lake City) proposal, the comments and response to the show cause order

[16] As previously noted in footnote 7(c) above, a pending petition for rule making (RM–2303) has been filed by the licensee of the Fuquay-Varina AM station (WAKS) proposing the assignment of Channel 280A to Fuquay-Varina.

filed by its licensee, Santee Broadcasting Co. (Santee), respecting the proposed shift to implement the Coastline Lake City proposal are also germane to Epperson's Fayetteville (and Lake City) proposal. Santee states therein that should we decide that the public interest requires the channel change at Kingstree so as to allow the proposed Lake City assignment, it has no objection to a modification of its license to accomplish this result, *provided* that it receives full reimbursement for all expenses reasonably and prudently incurred in accomplishing the channel change. Santee states, however, that, in accordance with the notice of rule making issued herein,[17] it does not waive its rights under Section 316 of the Communications Act and requests their recognition to the following extent: That, if the Lake City assignment proposal requiring the Kingstree channel change is adopted, it will, in good faith, negotiate with Coastline or any other successful applicant for the Lake City channel as to the appropriate reimbursement figure but that, if agreement cannot be reached between them, it herein formally requests that an evidentiary hearing be held to determine the proper reimbursement costs. It further submits that, under Section 316, no license modification for its Kingstree station can be effectuated until this evidentiary hearing is completed.

19. We have carefully considered Epperson's Class A proposal for Fayetteville in light of the timely supporting and opposing comments, arguments and response of the parties and find no compelling public interest reason for its adoption in light of our policy against the intermixture of Class A and Class C assignments in the same community, the proposal's impact on channel availability in other communities without a local FM outlet, and the aural broadcast services presently available at Fayetteville.

20. It is our general policy to avoid intermixing Class A and Class C assignments in the same community, as Epperson's Fayetteville proposal would do, in order that all local stations may have comparable facilities for service and competition. Since this is not always feasible or possible if opportunity for needed FM service is to be provided to communities with the available FM channels, in some instances as Epperson notes, we have departed from this policy where there was overriding public interest for doing so, such as enabling a community to have a choice of FM service where it can be accomplished without depriving other communities and areas of opportunity for needed service. Epperson's Class A proposal for Fayetteville, however, presents the possibility of providing Fayetteville with a choice of local FM service only by depriving another community (Fairmont) of its sole FM assignment and opportunity for a first FM local outlet and nighttime aural service, for which there is evidence of current demand,

[17] In the notice, we pointed out that, while it is well-settled Commission policy that a licensee is entitled to reimbursement when a change in the FM Table of Assignments is made which requires its station to change frequency, it is equally clear that the right to reimbursement is circumscribed; that some of Santee's claims for reimbursable costs seemed overstated from the standpoint of the guidelines for reimbursable costs furnished in other cases; and that the task of determining the appropriate costs, as in other similar cases, would be left to the good faith judgment of Santee and any permittee for the proposed Lake City Channel 261A assignment, subject to Commission approval in the event of disagreement. The cases referred to and cited on our reimbursement policy and guidelines included *Circleville*, 8 F.C.C. 2d 159 (1967); *Elizabethtown*, 26 F.C.C. 2d 162 (1970); *Greensburg, Burnside* and *Jamestown*, and *Oak Ridge*, 32 F.C.C. 2d 937 (1972), and decisions cited therein; as well as *Ashland* and *Roanoke*, 26 F.C.C. 2d 448 (1970), cited by Santee.

by disturbing two existing FM services in Conway and Kingstree (offset in part by making a Lake City assignment possible), and by precluding an assignment to a community in the Lillington area where there is also evidence of developing interest in establishing a first FM local outlet. In these circumstances, and considering also that a Class A channel at Fayetteville would not in any event, in our view, make for a wholly desirable assignment for a competitive local FM service, we would be adverse to providing Fayetteville with an additional FM assignment by means of this proposal, except upon a showing that the public interest nevertheless requires. We find nothing in the Epperson showing which would permit such a determination and nothing to convince us that Fayetteville, with three unlimited-time local AM services and one Class C FM service available, plus a local daytime AM outlet (all of which are taken into account in considering its need for additional local FM service),[18] is not being adequately served by its local aural broadcast services or has any pressing need for additional aural service which would warrant adoption of his subject FM proposal.

LAKE CITY CHANNEL 261A PROPOSAL

21. The remaining proposal to be considered is Coastline's proposal to assign Channel 261A to Lake City for a first FM assignment and a first local nighttime radio service by substituting Channel 252A for Channel 261A at Kingstree. In its supporting comments, Coastline affirms that if the proposal is adopted it will apply for authority to construct and operate a new FM station at Lake City on the channel and that it agrees "to make whole any reasonable and prudent outlay made by Santee in changing its channel" at Kingstree. Other than Coastline, none of the parties hereto commented on the merits of the proposal. The comments of Epperson deal solely with his conflicting Fayetteville (and Lake City) counterproposal, which we have already considered and rejected. The Santee pleading, discussed in paragraph 18 above, concerns its position respecting reimbursement for its change-over costs and modification of its license should the Coastline proposal be adopted and its Kingstree Channel 261A station (WDKD–FM) be required to change frequency.

22. As the notice pointed out, Lake City (population 6,247) is located in Florence County (population 89,438) in the east central portion of South Carolina, about 23 miles south of Florence (population 25,997) the county seat, and about 15 miles north of Kingstree (population 3,381), located in Williamsburg County (population, 34,243). Coastline adds that Lake City and its environs which would be served by the proposed FM operation contain a population numbering 11,762 persons, made up of Lake City Division (8,479), of which Lake City is a part, and Scranton Division (3,283), which adjoins Lake City. It further states that while the Sixth Congressional District of the state in which Lake City and Florence are located as a whole decreased in population over the 1960–1970 period due to the migration of farm labor to northern states, the portions thereof containing Lake City

[18] See *In re Relationship between the AM and FM Broadcast Services*, 39 F.C.C. 2d 645, 670 (1973); *Anamosa and Iowa City, Burlington, Iowa*, FCC 74–409, 46 F.C.C. 2d —— (1974).

(which had a 3.1 percent population increase, from 6,059 to 6,247) and Florence County (which had a 6.2 percent population increase, from 84,438 to 89,636) were among the few locations which had a population increase over the period. Coastline also informs that agriculture is the principal industry in Florence County, with the 1970 Census reporting 2,543 farms therein, and that, while manufacturers of business machines, zipper closures and clothing have established plants in and near Lake City in recent years, this area still remains predominantly a farming area with tobacco the principal crop.

23. The only aural radio outlet at Lake City is Coastline's AM station (WJOT), a daytime-only operation, and the nearest aural broadcast stations providing nighttime service are at Florence, where all other aural broadcast stations in Florence County are located. These consist of three AM stations (WOLS, WJMX, and WYNN, a daytime-only operation) and one FM station (WSTN), which operates on Channel 276A. The other Florence FM assignment (Channel 288A) is used by Station WDAR–FM at Darlington, South Carolina (population, 6,990), located in Darlington County (population, 53,442), ten miles to the northwest of Florence. Coastline's showing indicates that neither the Florence nor Darlington FM stations serve Lake City and that at the present time only Santee's Kingstree FM station (WDKD–FM) provides a 1 mV/m or better signal to Lake City.[19] It stresses that a new FM outlet and a first local nighttime aural service in Lake City could provide additional opportunities for local advertising and programming for its black community which constitutes approximately 35 percent of the population.

24. Our further consideration of Coastline's Lake City Channel 261A proposal and showings leads us to confirm our prior tentative conclusion that it is feasible; that the assignment of Channel 261A to Lake City and of Channel 252A in place of Channel 261A to Kingstree would comport with mileage separation requirements; and that the proposal would have no resulting adverse preclusionary effect on possible channel assignments elsewhere. We are also convinced that the assignment of an FM channel to Lake City would serve a need and demand there for an FM outlet and a first local full-time broadcast service. In addition, there being no available unassigned FM channel which could be assigned, we are satisfied that its proposal presents a justifiable and reasonable means of accomplishing this objective since it will enable Lake City to have a first FM assignment without loss of assignment elsewhere and will require only that the Kingstree FM assignment be replaced with an equally satisfactory Class A assignment. We therefore believe it clearly in the public interest and in furtherance of the mandate of Section 307(b) of the Communications Act for a fair, efficient and equitable distribution of radio service to assign Channel 261A to Lake City by changing the Kingstree Channel 261A assignment to Channel 252A. While this involves disturbing the existing Kingstree Channel 261A service, the public interest in the new Lake City assignment, in our view outweighs

[19] It was claimed in Coastline's engineering study that Station WDKD–FM covers approximately one-third of the Lake City urbanized area with a 1 mV/m or better service and that, if maximum facilities conforming with *Roanoke Rapids-Goldsboro, N.C.*, standards were used, Lake City would be completely within the 1 mV/m contour of Station WDKD–FM.

this consideration, particularly since there appears to be no significant technical advantage of Channel 261A over Channel 252A for use at Kingstree and since whatever disruption of service that may occur will be temporary.

25. Our action ordering the new Lake City and changed Kingstree FM assignments will require a change in the operating frequency of Santee's Kingstree station (WDKD–FM). As mentioned in paragraph 21, Coastline has stated its intention to apply for the new Lake City assignment and has agreed to reimburse Santee fully for any reasonable and prudent costs connected with accomplishing the change in its operating frequency. As stated in paragraph 18, Santee has also advised that reimbursement for its changeover costs to this extent would be agreeable to it and that it will also negotiate in good faith with Coastline or any other successful applicant for the new Lake City assignment as to the appropriate reimbursement figure which is reasonable and prudent.

26. The Communications Act provides licensees with no right to reimbursement when changes are required in their operating frequencies to permit other new or changed assignments which we have found, as here, to be warranted in the public interest and called for by Section 307(b) considerations. However, it is now well-settled Commission policy, evolved in FM and TV assignments cases where such reimbursement appeared feasible and equitable in the circumstances, to allow and provide for reimbursement for the reasonable costs of the channel change in such situations from the party or parties ultimately benefiting from the new or changed assignments thereby permitted. In the present case also, we believe that equitable considerations dictate that Santee should be reimbursed for the reasonable costs incurred in accomplishing the channel change, and that such reimbursement should come from whoever may be granted a construction permit for the new Lake City assignment, whether it be Coastline or someone else. While we have on occasion in similar cases stipulated items of expense which are appropriate for reimbursement and which are not (see, for example, the *Circleville* case and others cited in footnote 17, *supra.*), we generally leave the determination of the appropriate costs making up to the "reasonable" reimbursement figure to the good faith judgment of the parties eventually involved, subject to Commission approval in the event of disagreement, and we do so here. We see no reason why both Santee and the party becoming the Lake City permittee, assisted by the guidelines we have furnished in similar cases, such as *Circleville*, acting in good faith, cannot reach agreement on what constitutes a reasonable settlement of the costs of the channel shift, and we expect them to do so.

27. As mentioned above (para. 1) Santee, in the notice, was ordered to show cause why its license for Station WDKD–FM should not be modified to specify operation on Channel 252A instead of 261A, with the understanding that it would receive reasonable reimbursement for the change. Santee, while not challenging the merits of the subject Lake City assignment proposal or our authority to adopt it, advises in its pleading that it does not consent unconditionally to modification of its license during its license term to change its operating frequency, as is required to permit the new Lake City assignment. Rather, its

consent is conditioned upon its reaching agreement with Coastline or another successful applicant for the new Lake City assignment as to the proper "reasonable" reimbursement figure. If such an agreement is not reached, Santee requests an evidentiary hearing, as a matter of right under Section 316 of the Communications Act, to determine the proper reimbursement before its license is modified. We are opposed to this approach.

28. The matter of reimbursement, if allowed at all (it is clear that in many situations, such as in a comprehensive revision or restructuring of the existing FM or TV assignment table, provision for reimbursement to affected licensees would clearly not be feasible, if possible), is one of private equity and not a public interest consideration. Nor has Santee made any showing that a hearing on the reimbursement question would involve any public interest question or serve any useful purpose since the issue would be limited to whether the costs were reasonable, as the Commission has defined. The Commission must place the public interest above private interests in carrying out its duties, and we do not believe that the public interest would be served by conditioning or delaying new assignments or changes in assignments (found to have a public interest basis in a public rule making proceeding in which the affected licensee has participated) by resolving the reimbursement question in an adjudicatory hearing.

29. Therefore, since we believe the Lake City assignment, which requires the change in the Kingstree assignment occupied by Station WDKD–FM to be in the public interest, we are in accordance with *Transcontinent Television Corp. v. FC*, 113 U.S. App. D.C. 384, 308 F. 2d 339, 23 RR 2064 (1962), and our practice in similar circumstances in other FM assignment cases [20] making the amendments to the FM Table of Assignments effective 3:00 a.m. local time, December 1, 1975, the date of expiration of licenses of South Carolina broadcast stations, or such earlier date as the Commission may authorize interim operation on Channel 252A at Kingstree, as mentioned below, and we are ordering the licensee of Station WDKD–FM to file its December 1, 1975, renewal application specifying operation on Channel 252A instead of Channel 261A. Station WDKD–FM may continue to operate on Channel 261A until December 1, 1975, or until such earlier time as, upon its request, the Commission authorizes interim operation under special operating authority on Channel 252A, following which it shall submit, within 30 days, the measurement data normally required of an applicant for an FM broadcast station. The Commission will view such a request of Station WDKD–FM as a relinquishment of Channel 261A and a waiver of any rights it may possess with regard to that channel.

30. In view of the foregoing, IT IS ORDERED, That effective December 1, 1975, or earlier as indicated in footnote below, pursuant to authority contained in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended, the FM Table of Assignments, Section 73.202(b) of the Rules IS AMENDED, insofar as the communities named are concerned, to read as follows:

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[20] See, for example, *Wisconsin Dells, Wisconsin*, 35 F.C.C. 2d 473 (1972); *Rockford, Mendota, and Peru, Illinois*, 17 F.C.C. 2d 947 (1969); *Bellefontaine and Kenton, Ohio*, 3 F.C.C. 2d (1966).

City:	Channel No.
Kingstree, S.C.	252A [1]
Lake City, S.C.	252A [1]

[1] Effective 3 a.m., l.t., Dec. 1, 1975 (concurrently with the expiration of the outstanding license for station WDKD–FM on channel 261A at Kingstree, S.C.), or such earlier date as station WDKD–FM may, upon its request, cease operation on channel 261A at Kingstree.

31. IT IS FURTHER ORDERED, That the proposal to assign Channel 280A to Fayetteville, North Carolina, advanced by Stuart W. Epperson herein as a counterproposal (RM–2279), IS DENIED.

32. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Report and Order by Certified Mail—Return Receipt Requested, to Santee Broadcasting Co., Inc., licensee of Station WDKD–FM, Kingstree, South Carolina, and also a copy thereof by regular mail to its attorneys, Cohn and Marks, Washington, D.C.

33. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-792

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GENERAL ELECTRIC CABLEVISION CORP., DECATUR, ILL. For Certificate of Compliance	CAC-2511 CSR-357A IL135

MEMORANDUM OPINION AND ORDER

(Adopted July 17, 1974; Released July 29, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; REID AND QUELLO CONCURRING IN THE RESULT; COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. General Electric Cablevision Corporation (General Electric) operates a cable television system at Decatur, Illinois, a community located within the Springfield-Decatur-Champaign-Jacksonville, Illinois, major television market (#64), and serves approximately 7,863 subscribers with the following television broadcast signals:[1]

WAND (ABC, Channel 17) Decatur, Illinois
WCIA (CBS, Channel 3) Champaign, Illinois
WICD (NBC, Channel 15) Champaign, Illinois
WICS (NBC, Channel 20) Springfield, Illinois
WILL-TV (Educ., Channel 12) Urbana, Illinois

Additionally, the cable system is certified to carry, but is not now carrying, Station KPLR-TV (Ind., Channel 11), St. Louis, Missouri, and Station WTTV (Ind., Channel 4), Bloomington, Indiana.[2] On May 9, 1973, General Electric filed the above-captioned application for certificate of compliance and petition for special relief, seeking authorization to substitute the signal of Station WGN-TV (Ind., Channel 9), Chicago, Illinois, for that of Station WTTV. Oppositions to the application have been filed by Plains Television Corporation (Plains), licensee of Television Broadcast Stations WICD, Champaign, Illinois, and WICS, Springfield, Illinois; by WFIL, Inc. (WFIL), licensee of Television Broadcast Station WAND, Decatur, Illinois; and by Midwest Television, Inc. (Midwest), licensee of Television Broadcast Station WCIA, Champaign, Illinois.

2. General Electric acknowledges that since Chicago, Illinois, is the third closest top-25 market to Decatur (after St. Louis, Missouri,

[1] The community of Decatur has a population of 90,397. The cable system commenced operations in February, 1972, and currently has 30 channels available for carriage of broadcast and access services. Of these channels, five are used for television signal carriage, three are used for automated program originations, and one is used for nonautomated program originations.

[2] General Electric was granted its certificate of compliance (CAC-550) by the Commission on January 23, 1973. *See General Electric Cablevision Corp.*, FCC 73-92, 39 FCC 2d 158 (1973).

(#11) and Indianapolis-Bloomington, Indiana (#16)), being 17.2 miles or 11 percent more distant than Bloomington,[3] the leapfrogging provisions of Section 76.61(b)(2) of the Commission's Rules as incorporated in Section 76.63(a)[4] would ordinarily preclude carriage of an independent signal from Chicago. Nevertheless, General Electric believes a waiver of the Rules is warranted in view of "unusual circumstances surrounding this market." It contends that since the Commission has adopted the policy of treating all communities within a hyphenated market the same for most purposes, such communities should also be given "an equal opportunity" to carry the same independent signals. It notes that several systems in the market are already importing their distant independent signals from Chicago. Furthermore, General Electric argues, the residents of Decatur have little in common with the residents of Indianapolis or Bloomington, while, by comparison, there are many factors which closely relate Illinois citizens in Decatur with those in Chicago, "the economic and cultural center of Illinois." To illustrate, General Electric offers the following: two daily Chicago newspapers are home-delivered in Decatur, while none from Indianapolis or Bloomington are; three major banks in Decatur belong to the F.D.I.C. out of Chicago, and have direct WATS lines to Chicago; Decatur and Chicago are in the same time zone, while Indianapolis and Bloomington are in a different one; the residents of Decatur have a strong interest in corn and soybean reports, all of which come from Chicago, with none from Indianapolis or Bloomington; 25 percent of the students from the local college are from the Chicago area, while only 2 percent are from the State of Indiana; Decatur residents follow the Chicago Cubs, White Sox, Bulls, and Blackhawks, while there are no major sports in Indianapolis or Bloomington; six daily round trip flights are made to Chicago with no direct flights to Indianapolis; five daily round trip bus trips are made between Chicago and Decatur with no direct bus service to Indianapolis or Bloomington; four freight round trips to Chicago are made daily, while no such trips are made to Indianapolis or Bloomington; on a typical day, nine truck loads of mail are received from Chicago while only one such load is received from Indianapolis and Bloomington. These factors combine to create a common interest in economic and public affairs, news and sports coverage, and cultural and entertainment programming. Therefore, General Electric argues

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[3] The distances between the communities are:
Decatur, Illinois, to St. Louis, Missouri, 107.4 miles.
Decatur, Illinois, to Bloomington, Indiana, 138.9 miles.
Decatur, Illinois, to Chicago, Illinois, 156.1 miles.

[4] Section 76.63(a) provides: A cable television system operating in a community located in whole or in part within one of the second fifty major television markets listed in § 76.51(b) shall carry television broadcast signals only in accordance with the provisions of § 76.61, except that in paragraph (b) of § 76.61, the number of additional independent television signals that may be carried is two (2).

Section 76.61(b)(2)(i) provides: For the first and second additional signals, if any, a cable television system may carry the signals of any independent television station: *Provided, however,* That if signals of stations in the first 25 major television markets (see § 76.51()) are carried pursuant to this subparagraph, such signals shall be taken from one or both of the two closest such markets, where such signals are available. If a third additional signal may be carried, a system shall carry the signal of any independent UHF television station located within 200 air miles of the reference point for the community of the system (see § 76.53), or, if there is no such station, either the signal of any independent VHF television station located within 200 air miles of the reference point for the community of the system, or the signal of any independent UHF television station.

NOTE: It is not contemplated that waiver of the provisions of this subparagraph will be granted.

that carriage of WGN–TV instead of WTTV would be far more in the public interest. General Electric asserts that the 17.2 mile difference between Decatur-Chicago and Decatur-Indianapolis-Bloomington is insignificant and not a proper basis upon which to deprive the residents of Decatur of a valuable in-state signal in favor of an out-of-state, out-of-region signal providing no relevant local programming. Finally, General Electric states that it is the only customer of record for reception of WTTV by microwave on an application which has been pending since 1966, and that construction of this microwave system seems dubious, while WGN–TV's availability is assured. It doubts it could afford WTTV as the sole customer, even if the microwave system were built, but, in contrast, notes that ten other customers are requesting the service of WGN–TV, making possible a substantial tariff savings for all of the parties.

3. In their oppositions, Plains, Midwest, and WFIL argue: (a) that the Springfield-Decatur-Champaign-Jacksonville major market is not unique in that 53 of the top-100 major markets are "hyphenated," and that adoption of the "equal opportunities" policy suggested by General Electric would affect one-fourth of these 53 markets and would "open the floodgates"; (b) that the note to Section 76.61(b)(2)(i) of the Rules states that waiver of the anti-leapfrogging rule is not contemplated; (c) that the amount of news, sports, and public affairs programming provided by WGN–TV would not be significant since the bulk of programming carried by any independent station is composed of syndicated series and feature films, and that, in any event, the same facts offered to establish that a significant community of interest exists between Decatur and Chicago are true of a number of other midwestern cities, such as Terre Haute, Indiana, and Jackson, Michigan; (d) that the difference in mileage between Decatur-Chicago and Decatur-Indianapolis-Bloomington is not *de minimis;* (e) that the microwave argument is equivocal and unsubstantiated and that since WGN–TV is already carried or is slated for carriage on three times as many cable systems as WTTV, a waiver would only serve to aggravate the problem of microwave availability for stations like WTTV; (f) that UHF Station KDNL–TV (Ind., St. Louis), carries at least some programming directed to Illinois residents, and could be carried without any leapfrogging problems; (g) that the instant situation is distinguishable from those cases in which the Commission has granted leapfrogging waivers since Decatur cannot be considered to be within a "Capital District" and, finally (h) that a waiver would undermine the Commission's entire carriage scheme and would serve to perpetuate a dominance the Rules were designed to avoid. In addition, Midwest Television has submitted various newspaper articles from local Decatur newspapers to indicate that General Electric has been intending to seek carriage of WGN–TV all along but purposefully refrained from including the station in its original certificate application believing "it would be easier to obtain the erosion of the Commission's Rules through the piecemeal approach. . . ." Plains has submitted an engineering study to demonstrate that waiver of the leapfrogging rules for all communities within a hyphenated market would have a widespread effect.

4. We do not believe it appropriate at this time to adopt an "equal opportunities" policy regarding the importation of distant independent signals into hyphenated markets as suggested by General Electric. We have stated that we may, in the future, consider amendment of our leapfrogging rules to accommodate, for example, carriage of in-state signals in some or all situations. But, for the present, we intend to adhere to the policy determinations of 1972 to the effect that leapfrogging restrictions are necessary to insure a more even distribution of cable carriage benefits.[5] Nor are we persuaded by General Electric's arguments that the Indianapolis-Bloomington signals are "unavailable." In Paragraph 25 of the *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 335 (1972), we indicated our intention not to grant leapfrogging waiver requests because of microwave savings, absent compelling circumstances, and in the present case, General Electric has failed to prove that compelling circumstances exist. Nevertheless, we believe a waiver in the instant case would be consistent with our actions in *Commission on Cable Television of the State of New York*, *supra* note 5, and *First Illinois Cable TV, Inc.*, FCC 74–125, 45 FCC 2d 304, *recons. granted in part*, FCC 74–694, —— FCC 2d —— (1974). In *Commission*, we granted special relief to allow cable television systems in the "Capital District" (the communities within the Commission's definition of the Albany-Schenectady-Troy market) to carry two independent television signals from New York City, notwithstanding the leapfrogging restrictions of Section 76.61(b)(2)(i) of the Rules, upon a substantial showing that a strong community of interest between the cities exists. Similarly, in *First Illinois*, we waived the leapfrogging rules to permit cable systems located in and around the state capital (Springfield) to carry the signal of a distant independent station located in the state's largest city where the alternative viewing choices involved the same out-of-state signals as in the present case. Accordingly, we find that since Decatur is within the same market as Springfield,[6] and the existence of a strong special community of interest among these communities and Chicago has been established in both *First Illinois* and the instant proceeding, a grant of the requested waiver is warranted.[7] However, as in *Commission* and *First Illinois*, *supra*, our certification will be conditioned on General Electric's not employing Section 76.61(b)(2)(ii) of the Rules to delete in-state programming.

In view of the foregoing, the Commission finds that a grant of the subject application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition of Plains Television Corporation" filed June 18, 1973, by Plains Television Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition of WFIL, Inc." filed June 18, 1973, by WFIL, Inc., IS DENIED.

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[5] *Commission on Cable Television of the State of New York*, FCC 73–1148, 43 FCC 2d 826, 834 (1973), *recons. denied*, FCC 74–99, 45 FCC 2d 283 (1974).

[6] The distance from Decatur to Springfield is approximately 35 miles.

[7] Additionally, we note that the disparity in distances from the situs of the cable system (here Decatur) to the second and third closest markets is not significant (17.2 miles, representing 11 percent of the total distance). *Cf.*, *Cablevision of Augusta, Inc.*, FCC 73–1304, 44 FCC 2d 547 (1973).

IT IS FURTHER ORDERED, That the "Objection of Midwest Television, Inc." filed June 18, 1973, by Midwest Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–2511) filed by General Electric Cablevision Corporation IS GRANTED, subject to the condition stated in paragraph 4 above, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

47 F.C.C. 2d

109–004—74——9

FCC 74-741

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HENRY W. JACKSON-RINCON VALLEY CATV, RINCON VALLEY, ARIZ. For Certificate of Compliance	CAC-3347 AZ054

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 19, 1974)

BY THE COMMISSION:

1. On December 5, 1973, Henry W. Jackson-Rincon Valley CATV filed an application for a certificate of compliance to begin cable television service at Rincon Valley, Arizona, a community located within the Tucson, Arizona, smaller television market.[1] Rincon Valley proposes to carry the following television broadcast signals:

KGUN-TV (ABC, Channel 9) Tucson, Arizona
KOLD-TV (CBS, Channel 13) Tucson, Arizona
KUAT-TV (Educ., Channel 6) Tucson, Arizona
KZAZ (Ind., Channel 11) Tucson, Arizona

This proposed signal carriage is consistent with the cable television rules, and the application is unopposed.

2. Pursuant to Section 76.31(a) of the Commission's Rules, before a proposed operator may be granted a certificate of compliance, a franchise or other appropriate authorization first must have been obtained. Rincon Valley, however, has not yet obtained its franchise because the appropriate franchising authority, the Pima County Board of Supervisors, is considering whether to enact an ordinance which would regulate cable television in Pima County. Consequently, in lieu of submitting a franchise, pursuant to Section 76.7 of the Commission's Rules the applicant has requested special relief and has based this request upon Paragraph 116 of the Commission's Rules, *Reconsideration of the Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972), which provides for a case-by-case consideration when there is no franchise or other appropriate authorization available for the cable operator to submit in an application for a certificate of compliance. In such cases, the applicant may submit an alternative proposal to satisfy the requirements of Section 76.31.

3. Accordingly, in support of its request for special relief, Rincon Valley has made the following representations:

[1] Rincon Valley—a ranch development in Rincon Valley, Pima County, Arizona—is situated approximately 25 miles southeast of Tucson, Arizona. Jackson's proposed cable system will have a 12-channel capacity.

(a) Significant construction (at least 20 percent of the cable system's service area) will be accomplished within one year after certification; thereafter, each year there will be equitable and reasonable extension of energized cable to at least 20 percent of the service area;

(b) The initial monthly rate will be $9.50 per month, and any increase in rates will be made only with full notice to the system's subscribers; furthermore, the applicant assures that the Commission will be informed of any increases in those rates;

(c) The applicant pledges to resolve complaints equitably by providing local agents and by maintaining a toll-free telephone listing;

(d) The applicant will comply immediately with any effective changes of Section 76.31 of the Commission's Rules.

4. On April 18, 1974, Arizona Governor Jack Williams signed into law Senate Bill 1085, granting franchising authority to the Board of Supervisors of a county or the governing body of an unincorporated city or town. The effective date of the law is August 9, 1974. In view of the action of the Arizona State Legislature, although Rincon Valley has submitted what otherwise would have been an acceptable alternative proposal, we cannot accept this proposal. To do so would create conditions which may undermine the county's impending authority to franchise and regulate cable television. The recent action of the Arizona State Legislature precludes a grant of a certificate of compliance to this applicant based on the alternative proposal. As we stated in Paragraph 47, *Clarification of Rules and Notice of Proposed Rulemaking*, FCC 74-384, 46 FCC 2d 175 (1974), we will not grant special relief waivers of Section 76.31 in circumstances where the local governmental entities have the authority to issue franchises consistent with provisions of Section 76.31 but choose not to do so.[2]

In view of the foregoing, the Commission finds that a grant of the above-captioned application would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application (CAC-3347, AZ054) filed by Henry W. Jackson-Rincon Valley CATV, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] In the *Clarification* we stated, in pertinent part: ". . . [A]lternative proposals by the cable operator in such cases [where a franchising authority, while apparently having the authority to grant a franchise or other appropriate authorization consistent with our Rules, declines to do so] will not be accepted. Where the franchising authority has the power to comply with our Rules but does not, a certificate of compliance will not be issued. *See, e.g., Bayhead Mobile House Park*, FCC 74-589, —— FCC 2d —— (1974).

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF THE HUB CITY BROADCASTING CO., INC., LICENSEE OF STATION WHSY, HATTIESBURG, MISS.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1974; Released July 26, 1974)

1. The Commission, by the Chief of the Broadcast Bureau acting pursuant to authority delegated by Section 0.281 of the Commission's Rules, has under consideration (1) the Notice of Apparent Liability for forfeiture dated May 30, 1974 issued to The Hub City Broadcasting Company, Inc., the licensee of Radio Station WHSY, Hattiesburg, Mississippi and (2) the licensee's response of June 26, 1974 to the Notice.

2. The Notice issued to the licensee found apparent violations of Sections 73.39(d)(2) and 73.932(a) of the Commission's Rules. Section 73.39(d)(2) provides that remote reading antenna ammeters may be used by AM stations subject to several conditions, including the requirement that they "shall be calibrated to indicate within 2 percent of the regular meter over the range above one-third or one-fifth full scale." Inspections of the station on June 7 and November 27, 1973, revealed that the remote reading antenna ammeter varied from the regular antenna ammeter by 18.7 percent and 48.3 percent, respectively.[1] Both inspections also revealed that the EANS receiver was inoperative.

3. In response to the Notice of Apparent Liability the licensee states that the remote reading antenna ammeter had been calibrated only a few days before each field inspection. Licensee surmises that equipment failure occurred between the dates of the station's maintenance inspections and the dates of inspections by the FCC Field Engineers. Licensee admits that the EANS receiver was inoperative at the time of the June 7 inspection, but states that subsequently the receiver was set so that the EANS operated as prescribed. Licensee is unable to understand why "the device did not operate properly . . . during the November 27 inspection."

4. The Commission has frequently stated that licensees must operate in accordance with its Rules. See *James Broadcasting Co., Inc.*,

[1] At the time of the June 7 inspection by the New Orleans office of the Commission's Field Operations Bureau, the remote meter indicated 2.48 amperes while the regular meter indicated 3.05 amperes. At the time of the November 27 inspection, the remote reading was 1.55 amperes while the regular meter read 3.0 amperes.

23 FCC 2d 719, 19 RR 2d 354 (1970), *Quality Broadcasting Corp.*, 23 FCC 2d 949, 19 RR 2d 605 (1970). Accordingly, licensees are responsible for having equipment, and for maintaining that equipment, so that the station can operate in accordance with the Rules. See *Radio San Juan, Inc.*, 32 FCC 2d 666, 23 RR 2d 354 (1971). The failure to do so emphasizes the need for the imposition of sanctions so as to encourage compliance with the Rules. *Crowell-Collier Broadcasting Corp.*, 44 FCC 2444, 21 RR 2d 921 (1961). In this case, the licensee does not deny the violations. We find that the licensee violated Sections 73.39(d)(2) and 73.932(a) of the Commission's Rules on June 7 and November 27, 1973. The licensee's reply and all the circumstances of this case have been considered. It does not appear that there is any reason to set aside or reduce the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That The Hub City Broadcasting Company, Inc., licensee of Radio Station WHSY, Hattiesburg, Mississippi, FORFEIT to the United States the sum of five hundred dollars ($500) for repeated failure to observe Sections 73.39(d)(2) and 73.932(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
WALLACE E. JOHNSON, *Chief, Broadcast Bureau.*

FCC 74-760

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GEORGE T. HERNREICH, TRADING AS KFPW BROADCASTING CO. (KFPW-TV), FORT SMITH, ARK. For License To Cover Construction Permit	Docket No. 19291 File No. BLCT-2093
GEORGE T. HERNREICH (KAIT-TV), JONESBORO, ARK. For Renewal of License	Docket No. 19292 File No. BRCT-623

APPEARANCES

Arthur Stambler and *James A. Koerner* (Stambler & Shrinsky); *Harold R. Farrow*, *Richard L. Brown* and *Joel R. Kaswell* (Farrow, Brown, Cahill, Kaswell, Segure & Rader) on behalf of George T. Hernreich; *Benito Gaguine* (Fly, Shuebruk, Blume & Gaguine) on behalf of Carmine Patti; *Edward P. Taptich* (McKenna, Wilkinson & Kittner) on behalf of American Broadcasting Companies, Inc.; and *Philip V. Permut* and *Michael T. Fitch* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 9, 1974; Released July 17, 1974)

BY CHAIRMAN WILEY FOR THE COMMISSION:[1] COMMISSIONERS LEE AND HOOKS DISSENTING.

1. This proceeding arose out of the Commission's Docket No. 18811 confidential inquiry into network affiliation matters. That investigation was instituted under Sections 403 and 409(1) of the Communications Act of 1934, as amended, to determine whether any broadcast licensees or permittees had made payments to network officials to obtain network affiliations or to effect favorable changes in affiliation contracts. In view of questions raised during the inquiry as to George T. Hernreich's qualifications, his applications for renewal of Station KAIT-TV (Jonesboro, Arkansas) and for license to cover construction permit of Station KFPW-TV (Fort Smith, Arkansas) were designated for hearing in a consolidated proceeding by Commission Memorandum Opinion and Order, 30 FCC 2d 903, released July 28, 1971. The following issues were specified against Hernreich:

1. To determine all of the facts and circumstances surrounding the payments made by George T. Hernreich to a representative of

[1] Commissioner Quello, who did not hear oral argument, has read the transcript of the oral argument and is participating in this Decision pursuant to Section 1.277(f) of the Commission's Rules.

the American Broadcasting Company and the changes in the Station KAIT–TV affiliation agreement relevant thereto.

2. To determine whether George T. Hernreich made any misrepresentations to the Commission or was lacking in candor in connection with his representations to the Commission.

3. To determine in light of the evidence adduced pursuant to the above issues, whether George T. Hernreich has the requisite qualifications to be a licensee of the Commission.

4. To determine in light of the evidence adduced pursuant to the above issues, whether a grant of the applications would serve the public interest, convenience and necessity.[2]

2. Prehearing conferences and hearings were held in Washington, D.C., on various dates in 1971 and 1972, with the record being closed September 26, 1972. In an Initial Decision, 73D–18, released April 25, 1973, and an errata released April 27, 1973, Administrative Law Judge Forest L. McClenning found that Hernreich had twice dishonestly made payments to then ABC official, Thomas G. Sullivan, solely in order to effect favorable changes in KAIT–TV's network affiliation contract with ABC, and also had misrepresented certain facts in connection therewith to the Commission. On the basis of these findings, the Presiding Judge concluded that Hernreich lacks the requisite qualifications to be a licensee of the Commission. Accordingly, he recommended denial of the applications for renewal of Station KAIT–TV and for license to cover construction permit of Station KFPW–TV.

3. Hernreich filed exceptions to the Initial Decision and a supporting brief. Both the Broadcast Bureau and American Broadcasting Companies, Inc.[3] (ABC) filed reply pleadings. The Bureau also filed a statement in support of Initial Decision and limited exceptions thereto.[4] Oral argument before the Commission *en banc* was requested by Hernreich and was held on April 11, 1974.[5]

4. We have carefully considered the entire record in this proceeding, the Initial Decision, the exceptions and replies to exceptions and the oral arguments presented by the parties. In our view, the presiding Judge is correct in his ultimate conclusion that Hernreich's conduct requires denial of his application for renewal of Station KAIT–TV. However, in view of the additional circumstances, hereinafter set forth, we shall grant Hernreich's application for license to cover construction permit of Station KFPW–TV. Finally, except as modified herein and in our rulings on exceptions contained in the attached Appendix, the Judge's findings and conclusions are adopted.

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[2] We also granted program test authority for Station KFPW–TV, subject to our final action in the present proceeding.

[3] Hernreich subsequently proffered an Additional Brief in Support of Exceptions and a Further Additional Brief in Support of Exceptions. By Commission Order, 45 FCC 2d 606, released March 5, 1974, we denied Hernreich's request to file these two pleadings, but took official notice of Hernreich's intention to rely on cases cited in the two additional pleadings.

[4] In addition to the pleadings enumerated above, a comment was filed by Carmine Patti, a former official of ABC who appeared as a witness in this proceeding. The Broadcast Bureau filed a comment in response to Mr. Patti's submission. Mr. Patti is not a party in this case, and thus his pleading is not entitled to consideration.

[5] On April 24, 1974 Hernreich filed a Motion to Correct Transcript, requesting a number of corrections of an editorial or linguistic nature in the transcript of oral argument. The motion, which is unopposed, will be granted so that the transcript will correctly reflect the argument which was presented.

5. The critical issue to be resolved in this proceeding is Hernreich's culpability in making two separate cash payments of $3000 to Thomas Sullivan, an official in the Affiliate Relations Department of ABC in New York. In return for each payment Hernreich was promised and received an increase in the compensation rate of his ABC affiliation contract for Station KAIT–TV in Jonesboro, Arkansas. The question of Hernreich's culpability is not a close one. It is clear to us that in making the two payments to Sullivan, Hernreich was voluntarily and knowingly participating in a dishonest scheme for the purpose of obtaining an increase in his network compensation. Although Hernreich steadfastly contends that he was merely the innocent victim of Sullivan's extortion, the record in this proceeding provides no support for his assertion. There is not a shred of evidence, based on Hernreich's own testimony or otherwise, that there was any threat or even suggestion by Sullivan that Hernreich might lose his affiliation or suffer any other retaliatory consequences if he refused to make payments to Sullivan.

6. Although at the hearing Hernreich initially characterized his first payment to Sullivan on June 9, 1969, as extortion (Tr. pp. 79–82), he subsequently testified that at the time of the payment he thought the transaction was legitimate and only sometime later concluded that Sullivan was extorting money from him (Tr. pp. 93–98). However, we cannot accept Hernreich's assertions that on June 9 he believed he was paying a required fee to Sullivan, whose understanding of ABC policies and procedures would, Hernreich claims, legitimately expedite his request for a rate increase. Hernreich asserts that he understood neither the compensation rate policies of ABC nor significant provisions of his own affiliation contract; likewise he claims he understood neither how Sullivan would expedite his request nor whether the $3,000 payment was ABC's or Sullivan's fee. Hernreich would have us believe that he blindly, but in good faith, paid $3,000 to this man, who was neither the network regional manager for the area which included Hernreich's station nor one of the persons with whom Hernreich routinely dealt regarding affiliate relations at ABC. The Presiding Judge found, and we agree, that Hernreich's testimony is thoroughly discredited by the record. Hernreich's self-serving image as a credulous and naive victim of tangled business circumstances does not comport with the uncontroverted record facts. Without detailing all of evidence adduced below, we emphasize the following significant factors: Hernreich is an experienced broadcaster, a licensee of the Commission since 1956, who has dealt in network affiliation matters relating to two standard broadcast stations which he owns and to KAIT–TV which, at the time of his first transaction with Sullivan, had been an ABC affiliate for nearly four years. He was personally involved in arranging KAIT–TV's affiliation agreement with ABC in 1965. Hernreich also has participated in numerous network affiliates' meetings and pressed his demands at ABC for increased compensation over a period of many months in 1968 and 1969 before paying Sullivan to effect the changes.

7. It was a man of Hernreich's experience who, at an arranged meeting in a Chicago airport on June 9, 1969, paid $3,000 in cash to Sullivan, a payment which was recorded on the books of Station KAIT–

TV as a loan payment. In return Hernreich received a new ABC contract increasing KAIT–TV's compensation rate. Given Hernreich's background and the circumstances of payment, the Judge affirmatively found and we are fully convinced Hernreich knew that his payment was going to Sullivan personally and that it was a dishonest means of achieving his goals. Following his first payment to Sullivan, Hernreich traveled to ABC's offices in New York several times during the period June to October 1969, to request a further rate increase. His efforts having proved unsuccessful, Hernreich again responded positively to Sullivan's overture that for a payment of $3,000 or $4,000 a further rate increase could be arranged. Hernreich made a second payment of $3,000 to Sullivan under circumstances similar to those of the first payment—the two men met in a Chicago airport on or about October 29, 1969, Hernreich paid Sullivan $3,000 in cash and the payment was recorded on Station KAIT–TV's books as going to a consultant. Again, a rate increase was implemented in the affiliation contract between ABC and KAIT–TV.

8. We find Hernreich's second payment to Sullivan is particularly damaging to his claims of innocence, coming as it did only weeks after Hernreich was warned against making such payments by his personal friend, Mr. Coe, who was a retired official of ABC and a past business consultant for Hernreich. The Judge found that in consulting with Coe, Hernreich pledged Coe to secrecy as to Hernreich's identity and the station involved; that he refused to identify Sullivan by name or by position at ABC; but that, nonetheless, Hernreich asked Coe to report to ABC that one of its officials had asked for and received $3,000 for arranging an affiliate's network rate increase. Although Hernreich's and Coe's accounts of their meeting differ in some respects, they converge on one simple but important point, *i.e.*, after meeting with Coe, Hernreich knew that his dealings with Sullivan were not in any sense a legitimate way of doing business with ABC. The Judge concluded and we agree that the record fails to disclose evidence of an extortion scheme run by Sullivan insofar as Sullivan gave no basis at any time for a belief that Station KAIT–TV might lose its affiliation or otherwise suffer if payments were not made to Sullivan. Thus, there is no question but that Hernreich's second payment to Sullivan, like the first, was made solely to obtain dishonestly an increase in his network compensation.

9. Our denial of Hernreich's renewal application for Station KAIT–TV is fully consistent with our action taken in two other proceedings also involving Sullivan's activities where no adverse conclusions were drawn as to the qualifications of the particular licensees involved. See *Look Television Corporation* (*WJJY*), 44 FCC 2d 316, released December 20, 1973, and *Dubuque Communications Corp.*, 45 FCC 2d 553, released February 25, 1974.[6] The Presiding Judge in each of those cases made affirmative findings in favor of the stations which the Commission accepted. Here, Judge McClenning, who also presided in *Look*,

[6] Hernreich has also objected to the fact that the conduct of each of the licensees who had dealings with Sullivan was explored in separate proceedings. Since the circumstances of the licensees' transactions differed one from another in significant ways and since Hernreich has not demonstrated specifically how he was restricted in developing the full facts concerning his activities in question here, we can find no basis whatever for his asserting that he has been denied due process or deprived of a fair hearing.

concluded that Hernreich was guilty of misconduct. There is no merit to Hernreich's assertion that the resolution of all three cases must be the same, since the key facts in *Look* and *Dubuque*[7] were markedly different from the present case. For example, whereas Hernreich was well aware that Sullivan was not an authorized representative of ABC with respect to his station, and yet he made cash payments directly to Sullivan, in *Look* and *Dubuque* Sullivan was sent to the stations as a representative of ABC and he created a fictional corporation to receive the stations' payments. While the evidence in *Look* and *Dubuque* thus did not warrant adverse conclusions as to those licensees, the evidence in the present case establishes Hernreich as a knowing and willing participant with Sullivan in a dishonest scheme. Just as the record of licensee involvement in *Look* and *Dubuque* was different from the present case, so too was the culpability of the licensees.

10. We turn now to Hernreich's arguments, which analogize the instant proceeding to a criminal case and which claim that he was deprived of procedural and substantive due process because he was denied access to all the "prosecution's" evidence, *i.e.*, the Commission's confidential Docket No. 18811, and because he had the burden of proving his own innocence of the charged misconduct. The simple answer to Hernreich's contentions is that this is not a criminal proceeding and thus his reliance on criminal procedure and precedent is unfounded. Hernreich is an applicant who, under the Communications Act of 1934, as amended, has the burden of establishing that he possesses the requisite qualifications to be a licensee. Hernreich's request for disclosure of Docket No. 18811 was fully considered by the Review Board, 34 FCC 2d 708 (1972). The Board properly held that Hernreich had not shown a need sufficient to warrant an exception to our long standing policy of refused to make such matters available to a licensee who is subsequently charged with misconduct in an evidentiary hearing.[8] We find no denial of due process to Hernreich in refusing him access to Docket No. 18811, since by his admission he could have independently obtained materials similar to those contained in Docket No. 18811, since the Broadcast Bureau had informed Hernreich of all persons of whom it was aware that might have knowledge relevant to the designated issues, since the Bureau had offered to give Hernreich prior statements made by any of its witnesses before their appearances at hearing, and since we can find no indication that any relevant evidence has been suppressed.

11. Hernreich continues to complain of our Order, 40 FCC 2d 126, released March 21, 1973, in which we denied his request to introduce evidence of the public service programming rendered by KAIT-TV

[7] In a letter dated March 4, 1974, Hernreich objects to certain statements made in a pleading in the *Dubuque* proceeding. However, Hernreich did not request the statements to be stricken until after the *Dubuque* proceeding had been concluded. Since there has been no reason for those statements to be given further consideration in conjunction with Hernreich's case and since those statements are not now before us and in fact have not been considered in deciding this case, we find no basis for any further action concerning Hernreich's letter.

[8] The recent case of *Michael D. Bramble*, 45 FCC 2d 96, 28 RR 2d 639, released September 25, 1973, cited by Hernreich does not support his argument for disclosure of Docket No. 18811. In *Bramble* the Commission allowed inspection of investigatory files to assist an employee who was not charged with misconduct in filing a petition for reconsideration of the Commission's refusal to act on his complaint against a licensee. Under those particular circumstances, the substantial public interest policies supporting nondisclosure, as outlined in *Bramble*, were not jeopardized.

and his other stations. We reaffirm the rationale of that Order: Once an applicant is shown to be guilty of misconduct such as Hernreich's improper payments to network officials, a grant of a license for the station involved would not be in the public interest. In this connection, the adverse determination is so compelling that there simply is no reason to consider such past programming, no matter how meritorious it may have been. The cases cited by Hernreich do not conflict with our denial of his request to rely on past programming or mandate a different result.[9] *Melody Music* is inapposite inasmuch as the Court, in setting aside the Commission's denial of an AM license because the principals had engaged in TV quiz show rigging, did not compel the Commission to consider the licensee's public service showing but simply required the Commission to explain its different treatment of apparently similarly situated licensees.[10] It is also significant that in cases where a meritorious broadcast record was deemed to be of some decisional importance, either all of the corporate officials of the licensee who were engaged in unlawful activity had been removed, as in *TelePrompTer*, or the Commission failed to find active and deliberate participation in wrongdoing on the part of those who controlled the licensee, as in *Western Connecticut* and *Bluegrass*. In the present case it has been determined that Mr. Hernreich, who continues to control Station KAIT–TV as its sole proprietor, personally and knowingly conducted dishonest transactions to advance the private interests of his station contrary to the public interest. Under these circumstances, consideration of Hernreich's past programming is neither required nor appropriate.[11]

12. Since denial of license renewal is the ultimate sanction which we can impose, we have reached the conclusion that denial of Hernreich's application for renewal of Station KAIT–TV is warranted, only after exhaustive consideration of the entire factual situation. *Continental Broadcasting, Inc.*, 15 FCC 2d at 131. The dishonest activity in which Hernreich engaged was not just misconduct by a person who also happened to be a licensee. Rather, it was wrongdoing pursued specifically to advance his financial interests as a licensee. Given this fact, and in view of the total absence of any justification for his transgressions, we conclude that a denial of Station KAIT–TV's renewal application is required by the public interest. However, Hernreich's misconduct in no manner touched Station KFPW–TV, which commenced broadcasting almost two years after the Hernreich-Sullivan incidents and more than a year after exposure of those matters. In view of the absence of any evidence of misconduct committed at KFPW–TV and the unlikelihood that the misconduct involving KAIT–TV will be repeated in his operation of Station KFPW–TV,

[9] Hernreich cites *Melody Music, Inc.*, v. *F.C.C.*, 120 U.S. App. D.C. 241, 345 F. 2d 730, 4 RR 2029 (1965); *TelePrompTer Cable Systems, Inc.*, 40 FCC 2d 1027 (1973); *Western Connecticut Broadcasting Company (WSTC and WSTC–FM)*, 43 FCC 2d 730 (1973); and *Bluegrass Broadcasting Co., Inc.*, 43 F.C.C. 2d 990 (1973).

[10] Hernreich's further contention that he cannot be treated differently from ABC is equally unavailing, since no questions warranting consideration of ABC's qualifications to be a licensee have been raised after our Docket No. 18811 investigation of this matter.

[11] While the Broadcast Bureau also urges that Hernreich made misrepresentations in connection with his petition for reconsideration and immediate program test authorization for Station KFPW–TV, we are not convinced that those statements constitute willful and affirmative misrepresentations. Although it is clear that Hernreich's statements pressed to the outer limits of acceptable advocacy, on balance they appear to be founded on a plausible interpretation, albeit narrow and self-serving, of certain aspects of his role in this affair.

we are convinced that the public interest would be served best by a grant of the license to cover construction permit of Station KFPW–TV.

13. Accordingly, IT IS ORDERED, That the letter request filed March 4, 1974, by George T. Hernreich, IS DENIED; and

14. IT IS FURTHER ORDERED, That the Motion to correct Transcript, filed April 24, 1974, by George T. Hernreich IS GRANTED; and

15. IT IS FURTHER ORDERED, That the above-captioned application of George T. Hernreich, for renewal of license of Station KAIT–TV (File No. BRCT–623), Jonesboro, Arkansas, IS DENIED and his application for license to cover construction permit for Station KFPW–TV (File No. BLCT–2093), Fort Smith, Arkansas, IS GRANTED; and

16. IT IS FURTHER ORDERED, That George T. Hernreich, IS AUTHORIZED to continue to operate Station KAIT–TV until 12:01 a.m., September 1, 1974, to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That, if the licensee seeks judicial review of our Decision, it is authorized to continue to operate Station KAIT–TV until thirty (30) days after the final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Rulings on exceptions of George T. Hernreich

Exception No.	*Ruling*
1	Denied. The procedures followed in the docket No. 18811 confidential inquiry were consistent with the investigatory purposes of that proceeding and worked no injustice on Hernreich. Further, our present action respecting Hernreich's applications is based solely on the record evidence as established in the present proceeding, not on the predesignation investigation.
2, 3, 4, 8, 9, 11, 12, 13, 14.	Denied. The presiding judge's rulings are in accord with the Commission's rules, and are not otherwise violative of Hernreich's right to due process.
5, 15	Denied. See par. 11 of this decision.
6	Denied. Our previous order denying Hernreich's petition for a further Bill of Particulars, 33 FCC 2d 311, is correct.
7, 10	Denied. See par. 10 of this decision.
16	Denied. See par. 9 of this decision.
17, 46, 53, 59, 60, 64, 75.	Denied. We agree with the judge's findings and conclusions, which are relevant and supported by the record evidence.
18, 21, 24, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 44, 45, 47, 48, 49, 50, 51, 52, 54, 67, 74, 76, 78, 81.	Denied. The judge's findings and conclusions adequately and correctly reflect the record evidence.
19, 20, 22, 23, 41	Denied as being of no decisional significance to the outcome of this proceeding.
25	Denied. The requested finding is speculative and not supported by the record of evidence.

Exception No.	*Ruling*
29, 37, 38, 39, 40, 42, 43, 66, 68, 69, 70, 71.	Denied as being of no decisional significance in light of our decision in this proceeding.
55, 56, 57, 58, 61, 62, 63.	Denied. See pars. 5–7 of this decision.
65	Denied in substance. See pars. 11–12 of this decision.
72, 84, 85	Granted in substance. See par. 11, n. 11 of this decision.
73, 79	Denied. See pars. 7 and 8 of this decision.
77	Granted to the extent of deleting the judge's explanation of Mr. Patti's motives as based on speculation. Denied in all other respects since the judge's findings otherwise adequately and correctly reflect the record evidence.
80, 82, 83, 86	Granted to the extent that the application for license to cover construction permit for Station KFPW–TV is granted and Denied in all other respects.

Rulings on exceptions of the Broadcast Bureau

1, 2, 3, 4, 5	Denied. The judge's findings adequately and correctly reflect the record evidence.
6	Denied. See par. 11, n. 11 of this decision.

FCC 73D-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
GEORGE T. HERNREICH, TRADING AS KFPW BROADCASTING CO. (KFPW-TV), FORT SMITH, ARK.	Docket No. 19291 File No. BLCT-2093
For License To Cover Construction Permit	
GEORGE T. HERNREICH (KAIT-TV), JONESBORO, ARK.	Docket No. 19292 File No. BRCT-623
For Renewal of License	

APPEARANCES

Arthur Stambler and *James A. Koerner* (Stambler & Shrinsky); *Harold R. Farrow*, *Richard L. Brown* and *Joel R. Kaswell* (Farrow, Brown, Cahill, Kaswell, Segure & Rader) on behalf of George T. Hernreich; *Benito Gaguine* (Fly, Shuebruk, Blume & Gaguine) on behalf of Carmine Patti; *Edward P. Taptich* (McKenna, Wilkinson & Kittner) on behalf of American Broadcasting Companies, Inc.; and *Philip V. Permut* and *Michael T. Fitch* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

FOREST L. MCCLENNING

(Issued April 20, 1973; Released April 25, 1973)

PRELIMINARY STATEMENT

1. By order released July 29, 1971, pursuant to the provisions of Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications were designated for hearing in a consolidated proceeding on the following issues:

(1) To determine all of the facts and circumstances surrounding the payments made by George T. Hernreich to a representative of the American Broadcasting Company and the changes in the station KAIT-TV affiliation agreement relevant thereto.

(2) To determine whether George T. Hernreich made any misrepresentations to the Commission or was lacking in candor in connection with his representations to the Commission.

(3) To determine in light of the evidence adduced pursuant to the above issues, whether George T. Hernreich has the requisite qualifications to be a licensee of the Commission.

(4) To determine in light of the evidence adduced pursuant to the above issues, whether a grant of the applications would serve the public interest, convenience and necessity.

2. The order of designation directed the Chief of the Broadcast Bureau to serve upon the applicants a Bill of Particulars setting forth the basis for the adoption of the above hearing issues 1 and 2. A Bill of Particulars was served October 27, 1971, a copy of which is appended hereto as Appendix A. The order of designation notes the pending applications for renewal of licenses of Stations KFPW (BR–623) and KZNG (BR–2913) which are licensed to George T. Hernreich and the pending application for George T. Hernreich for a construction permit for a new FM broadcast station at Fort Smith, Arkansas (BPH–6180, Docket No. 18241)[1] With reference to these applications it is specified that action on the renewal applications will be held in abeyance pending final resolution of the issues in this proceeding and as to the renewal applications resolution of the issues herein will be binding on George T. Hernreich and will be *res judicata* as to him. It was further ruled that the final resolution in the instant proceeding will be determinative of Hernreich's qualifications in Docket No. 18241. The order of designation also noted that the Commission had deferred action on the request for program test authorization for Station KFPW–TV pending consideration of the license application and there was pending before it Mr. Hernreich's "Petition For Reconsideration and Urgent Request For Immediate Grant of Program Test Authority." On the basis of this petition program test authorization was granted "subject to whatever action we may deem appropriate as a result of the hearing ordered herein."

3. Prehearing conferences and hearing were held on various dates in 1971 and 1972 with the record being closed September 26, 1972. Proposed findings of fact and conclusions of law were filed by George T. Hernreich and by the Broadcast Bureau November 30, 1972 with American Broadcasting Companies, Inc. filing a "Statement and Partial Findings." Reply findings were filed December 15, 1972 by the Broadcast Bureau and January 12, 1973 by the other parties.

FINDINGS OF FACT

4. Mr. George T. Hernreich has been a licensee of the Federal Communications Commission since 1956. His standard broadcast Stations KFPW Fort Smith, Arkansas and KZNG Hot Springs, Arkansas are affiliated with the Columbia Broadcasting System. Station KAIT–TV is affiliated with American Broadcasting Companies, Inc. (hereinafter ABC). Station KFPW–TV has no basic affiliation, but does carry network programs. In addition to his broadcast interests Mr. Hernreich is engaged in the jewelry business as a diamond importer.

5. The matters at issue in this proceeding directly relate only to Station KAIT–TV. Mr. Hernreich was granted a construction permit for Station KAIT–TV, April 8, 1960, and the station commenced operation July 15, 1963. Although Mr. Hernreich sought an affiliation from each of the three major television networks for Station KAIT–TV before it went on the air, none was received and it commenced operation as an independent. Mr. Hernreich continued to seek a net-

[1] See Initial Decision released December 17, 1971 proposing grant of application File No. BPH–6180 (FCC 71D–97) and order released February 18, 1972 (FCC 72–R–372).

work affiliation and in the course thereof had area studies prepared by Arkansas State University. The studies were submitted to the networks. Mr. Hernreich also sought the assistance of the Federal Communications Commission several times during the period 1963–1965 in an effort to obtain network programming for Station KAIT–TV.

6. In the course of his efforts to secure a network agreement Mr. Hernreich several times sought affiliation with ABC. On the basis of its initial research ABC determined that it did not have any network service routed through Jonesboro, that the nearest interconnecting point was Memphis, Tennessee and that interconnection between Memphis and Jonesboro would be extremely expensive for the network. It was concluded that under these conditions ABC had adequate coverage in Jonesboro via its affiliate in Memphis. Mr. Hernreich, however, persisted in his arguments and Mr. Robert L. Coe, Vice-President of Affiliate Relations for ABC concluded they seemed to have some merit. He, therefore, had additional studies made by the research department and it was concluded that it would help the overall coverage of ABC to have an operation in Jonesboro.

7. At a meeting in New York, N.Y. with Mr. Coe and Mr. Charles T. Leasure, the ABC Regional Manager for the area that included Jonesboro, on September 8, 1965 an affiliation agreement was entered into under which Mr. Hernreich would install and maintain a microwave relay from Memphis to Jonesboro at his expense with ABC delivering the programs to a designated location in Memphis. This initial agreement specified a network hourly rate of $100 for Class A hours, $50 for Class C and $33.30 for Class D,[2] a compensation rate of 30 percent and 11 free hours. The 30 percent compensation rate was the usual rate in affiliation agreements. The standard form provided for waiver of compensation for 22 unit hours, the waiver being termed the "affiliation fee." On the contract reached with Mr. Hernreich the figure 22 was crossed out and 11 inserted, Mr. Coe testifying that this reduction was to partially offset the expense Mr. Hernreich would incur for the microwave relay and this was discussed during the negotiations. Mr. Hernreich, however, testified that while he knew he "was giving them 11 free hours" he had no understanding that this was more or less than normal or that the compensation rate of 30 percent was the usual rate paid, in fact that "he didn't discuss anything about the contract with him. I was so happy to get it."

8. The initial affiliation contract was pursuant to Commission Rules for a period of two years. A new affiliation agreement was entered into May 19, 1967 under which new formulas were used for computing station rate and the affiliation fee. Hourly rate remained unchanged. The affiliation fee was again reduced below the printed amount appearing in the form contract. This new contract sets forth the network station rate as $100 with compensation rates varying from 30% for the hours 6:00 p.m. to 11:00 p.m. to 7% for the hours sign-on to 10:00 a.m. Monday through Friday and sign-on to 8:00 a.m. Saturday and Sunday. In lieu of the "affiliation fee" of 11 free hours the

[2] Class A hours were 6:00 p.m. to 11:00 p.m. Class C hours Monday through Friday were 5:00 p.m. to 6:00 p.m., Saturday and Sunday 2:00 p.m. to 6:00 p.m. and 11:00 p.m. to network sign-off. All other network hours were Class D.

contract provides for a deduction of 121% of the network station rate per week. Mr. Arnold Marfoglia of ABC testified that in terms of dollars the 121% was a similar deduction to the 11 free hours deduction in the initial affiliation agreement. Mr. Hernreich testified that at an affiliates meeting in May of 1967 they were informed by ABC of a change in computing rates, but he was "never able to figure it out." ABC advised that the new formula overall "would maybe be more, maybe be less" so he just accepted it. Mr. Hernreich signed and returned this agreement with a covering letter dated May 29, 1967 in which it is stated "I certainly was in hopes of getting a small increase, but am sure this will automatically come along very soon."

9. At the time the station's per quarter hour homes were increasing under the ARB sweeps Mr. Hernreich contacted Mr. Leasure, the ABC Regional Manager, attempting to get an increase in hourly rate. August 31, 1967 Mr. Charles Leasure wrote stating that the Rate Committee had recently met, reviewed the March 1967 ARB Surveys, and decided that it was impossible to grant a rate increase for KAIT–TV. The letter also stated:

> Rest assured that we will continue to keep a watchful eye on your progress, and will act when an increase is justified. Meanwhile, please bear in mind that you may continue to hound me with impunity, and that I'll do the best I can for you.

10. Mr. Hernreich also visited the ABC offices in New York during 1968 and 1969 with respect to obtaining an increase in the network hourly rate. During these visits he had conversations concerning an increase in hourly rate with Mr. Carmine Patti, the Director of Stations Relations in the Affiliate Relations Department. Mr. Joseph Merkle, Mr. Eugene Klimek also of the Affiliated Relations Department and Mr. Charles Leasure. Mr. Hernreich testified that Mr. Leasure had told him that when he reached 10,000 homes, he would automatically get a raise and at one of these meetings Mr. Leasure verified this statement having been made.

11. Mr. Hernreich first met Mr. Thomas Sullivan at the offices of ABC in New York in the latter part of 1968. He knew Mr. Sullivan was an employee of ABC, but at that time did not know in what capacity. In May of 1969 at a meeting of ABC affiliates in San Francisco he again met Mr. Sullivan. By that time he knew that Mr. Sullivan was in the Affiliate Relations Department and in a casual conversation told him "You know I have been beating my brains out trying to get the raise that was promised me. I can't seem to crash through. I can't seem to get it." Mr. Sullivan said "I will let you know tomorrow" and the conversation ended.

12. They met again the following day and Mr. Sullivan stated he had been unable to find out about a rate increase, but that Mr. Hernreich was entitled to an increase in his compensation rate from 30 to 35 percent because of providing his own microwave relay. Mr. Hernreich testified that this was the first time anyone had told him he deserved an increase due to the fact that he was maintaining his own microwave relay. Mr. Sullivan also told him that some affiliates received rates of compensation as high as 40 or 50 percent, that Station KAIT–TV was entitled to the increase and he could arrange to get it if Mr. Hernreich

would give him $3000. Mr. Hernreich interpreted this to mean "that it would cost me $3000 in order for him to work on getting this percentage up, to which I was entitled. That was his way of extorting $3000 from me." He subsequently, however, testified that at the time of payment he did not know it was extortion, that he thought "this was the natural way of getting your increase." (See paragraph 14, *infra.*) Mr. Hernreich responded "Well, I will let you know," and the conversation ended. About one week to 10 days later, Mr. Sullivan telephoned Mr. Hernreich regarding the proposition and urged him to accept the deal because the compensation rate increase would be constant, i.e., applicable to future, higher hourly rates as well as the present rate. Mr. Hernreich told Mr. Sullivan "We will go along, but this is an awful squeeze play." They then arranged to meet in Chicago on June 9, 1969. To secure funds for the $3000 payment Mr. Hernreich borrowed $5000 from a bank. He then purchased a cashier's check payable to himself in the amount of $3000 using a check drawn on the KAIT–TV bank account. This check was thereafter entered on the KAIT–TV books as a loan payment to the Mercantile Bank by the entry "Cash-Mer Bank 3000 L."

13. They met at an airport in Chicago and Mr. Sullivan stated "I have the contracts." They then had coffee at which time Mr. Sullivan asked if they could get the check cashed. Mr. Sullivan had rented a car and they drove to a bank where, after considerable difficulty, Mr. Hernreich cashed the check. On the way to the bank they had stopped at a coffee shop where Mr. Hernreich signed the contract. He did not read the contract, but assumed that ABC was increasing KAIT–TV's compensation rate by 5%, i.e., from 30% to 35%. The new contract dated June 4, 1969 did embody this change through the following provision in Schedule A, Station Compensation:

> Notwithstanding anything herein contained, it is understood that your total compensation under this agreement will be computed by multiplying by 116.667% all amounts due you from application of the compensation formula under paragraph (a) hereof as well as from the broadcast of all programs comprehended by paragraph (b) below. . . .

This provision was initialed by Mr. Hernreich at the time of signing and thereafter by Mr. Richard L. Beesemyer on behalf of ABC at the time he signed the contract. The contract otherwise remained the same as the 1967 contract (paragraph 8, *supra*). Mr. Beesemyer signed the contract following his appointment as vice-president in charge of Affiliate Relations for television on the advice of Mr. Carmine Patti, Director of Station Relations, that it was old business that had been approved and processed prior to his appointment.

14. Mr. Hernreich testified as follows regarding his understanding of the transaction as of the time of the Chicago meeting:

> Q. What was your understanding of your arrangement with Mr. Sullivan as to what he was to give you? What were you to receive as a benefit in this arrangement?
> A. My percentage increase of five percent.
> Q. Do you——
> A. I don't know if Mr. Sullivan gave it to me. He didn't give it to me.
> Q. Who gave it to you?
> A. ABC.

Q. By that, what do you mean? Did you understand Mr. Sullivan to be an agent for ABC at this time? Taking this money for ABC?

A. Well, I didn't understand anything. I just understood that he was with ABC and he got me this five percent increase that I couldn't get or didn't know anything about.

Q. Did you——

A. I don't know the workings of ABC now. I am not familiar with how they do things.

Q. You testified earlier that you understood if you had not paid this $3,000 that your understanding was that you would not receive the increase.

A. That is right.

Q. Did you understand—I thought that I understood you to say that you understood that this was, as you termed it, extortion or some sort of blackmail or bribery.

A. Exactly. That is what I termed it.

Q. Then you knew that ABC really wasn't——

A. You are asking what happened at the time I signed this contract?

Q. Yes, in Chicago.

A. At that time, I didn't know it was extortion. At that moment, I didn't know it was extortion.

Q. What did you think it was at that time?

A. I didn't know what it was. I just thought that this was the natural way of getting your increase. That is all.

Q. Did you think——

A. The man charged me a fee for it at that minute.

Q. Did you think Mr. Sullivan was going back to ABC and deposit this in an ABC account?

A. I don't know what—I don't know the workings at all. I don't know what Mr. Sullivan would have done. Later on I found out that he was not a very fine character, but I didn't know that at that minute.

Q. Let us stay at this minute.

A. Let us stay at this minute.

Q. You are telling me that you didn't know that Mr. Sullivan—This is your own subjective feelings—that Mr. Sullivan was taking this money for his own purposes?

A. At this moment, I did not.

[Colloquy between counsel omitted.]

Q. What was your understanding as to how you received an increase at ABC?

A. I don't have any understanding. I don't know how they operate.

Q. Mr. Hernreich, isn't it a fact that you knew that Mr. Sullivan was going to take this $3000 and put it in his pocket?

A. I did not know. No.

Q. Why did you call it extortion?

A. I found out later on it was extortion, not at that minute. You are asking be about that minute.

Q. Right. At this moment, you thought this was a legitimate——

A. I thought it was legitimate, yes, at that minute. He was just charging me a fee to help me get something I was entitled to.

Q. What was he charging you a fee for, if he was helping you?

A. Everybody charges you a fee for something.

PRESIDING EXAMINER. When you say he was charging you a fee, you mean the fee was to go to him personally, don't you?

A. I did not know it, not at this minute.

PRESIDING EXAMINER. Do you mean he was charging a fee on behalf of ABC to give you this increase?

The WITNESS. No, Mr. Examiner. He was going to get me this increase. He knew the workings of ABC or how to get the increase in the percentage I was entitled to, so he told me: "You are entitled to this. You have got your own micro relay."

Well, I am gullible. I listened to it and I went for it. At that minute I thought: "Well, this is the way you get it done. He charged me this fee for doing it."

PRESIDING EXAMINER. And when he charged you this fee for doing it, who is "he"?

The WITNESS. Mr. Sullivan.
PRESIDING EXAMINER. And you mean then that the fee—that you knew the fee was to go to Mr. Sullivan?
The WITNESS. I didn't know who it went to. I didn't say it was going anywhere. I didn't know who it was going to.
Q. All you knew was that Mr. Sullivan was charging you a $3000 fee?
A. That is right.
PRESIDING EXAMINER. And you had no concept of who was going to get that money, is that correct?
The WITNESS. I had none whatsoever, sir.

15. Mr. Hernreich later saw Mr. Sullivan several times on trips that he made to New York in pursuit of an increase in his network hourly rate. These were casual meetings, usually over lunch with others present, but this transaction was never discussed. Mr. Hernreich, however, did not believe that Mr. Sullivan felt apprehensive about talking to him in front of others.

16. Mr. Hernreich continued requesting a rate increase during the period June to October 1969. These requests were made to Mr. Charles Leasure, ABC regional manager for KAIT–TV, Mr. Carmine Patti, ABC Director of Station Relations, Mr. Joe Merkle, contracts manager in the ABC Affiliate Relations Department, and Mr. Gene Klimek, ABC supervisor of station development. The ABC personnel with whom Mr. Hernreich spoke said the requests would be considered, but he was never notified of any action on the requests.

17. On or about the 27th of September, 1969 Mr. Hernreich was in New York attending a CBS affiliates meeting and while there he went to the ABC office. He met Mr. Sullivan and they had lunch together at the Warwick Hotel which is across the street from the ABC offices. Either at that meeting or by telephone subsequently Mr. Sullivan informed him that Station KAIT–TV had qualified for an hourly rate increase from $100 to $125 and he could obtain it for him for a fee of $3000 or $4000. Mr. Hernreich is not sure which sum he asked, but believes it was $3000. Mr. Hernreich testified he was not interested in this proposal as he "didn't have the $4000 and I felt now there was something fishy going on which I didn't think the first time. . . ." He was, however, afraid of Mr. Sullivan's power over his affiliation and told him either "well, I will just let you know" or that he "would think it over."[3] He had no doubt "that this was not the normal channels of business at ABC."

18. Mr. Hernreich determined to discuss this matter with Mr. Coe (see paragraph 7, *supra*) who, after his retirement from ABC in 1967 had become a professor of radio and television at Ohio State University. Mr. Coe and Mr. Hernreich were personal friends and Mr. Coe had also been employed in the past as a business consultant for Mr. Hernreich. Mr. Coe asked if the matter could be discussed on the telephone and Mr. Hernreich said no, they would have to meet in person. They arranged to meet at the Columbus, Ohio airport on October 12, 1969. The following is Mr. Hernreich's account of the information he gave Mr. Coe:

[3] Mr. Hernreich testified he didn't "know how much power he had. All I could assume was that he had a lot of power" as he was "putting the squeeze on me, extorting this money from you openly."

When I saw Mr. Coe, I told him—I said: "I have something to divulge to you but you have to keep my name out of it." I said to him: "There is a cancerous condition existing at ABC and I want to explain what it is."

I told him how some man asked me for $3,000 and was asking me for $3,000 again or $4,000, whatever the amount was, $3,000 or $4,000, and that I wanted him to divulge the information to some official of ABC.

He said: "You ought to tell them." I said: "First of all, Bob, I don't know who to go to and I am scared to death. I wouldn't know who to go to. I may walk in there and play Russian roulette and talk to just the man who is implicated in this thing. I don't know who to go to. You know everybody. You have been an executive on the Board and you know who to go to."

He said: "Who is the man?" I said: "I can't divulge that name to you. I am frightened to death." I said: "You can't mention my name. I am frightened to death of your using my name also." He said he would get the information to ABC. We stayed around the airport and talked about an hour.

Mr. Coe advised him not to make any payments to this individual and Mr. Hernreich told him "I already have." Mr. Coe then advised him "Don't pay any more." He did not then tell Mr. Coe either the name or position of the ABC individual involved and denied stating to Mr. Coe "that sometimes it is necessary to make pay-offs in business." He believed that with the information he had given Mr. Coe "he would at least let ABC know what was going on" that even under the guidelines he had set and the pledge to secrecy Mr. Coe could let them know "There is a man in their organization who is extorting money from affiliates."

19. As to this meeting Mr. Coe testified that Mr. Hernreich pledged him to secrecy regarding what he was going to tell him and then told him that he had been endeavoring to secure from ABC some increase in the rate of compensation and had spoken to a number of people at ABC without success. He then informed him he had met someone at ABC that Mr. Coe did not know who had informed him he could get more money from ABC if he would pay this individual a certain amount of money. Mr. Hernreich told Mr. Coe he had paid a fee to the individual and shortly thereafter received an amendment to his ABC contract increasing the rate of compensation. He then told Mr. Coe he thought KAIT–TV also deserved a higher station rate due to increased audiences and that the same ABC employee had told him that could also be obtained for payment of a fee. Mr. Coe testified that he had advised Mr. Hernreich that he had made a serious mistake in ever paying any money to any individual, that he tried to persuade Mr. Hernreich to take this information to ABC and advised him that under no circumstances should he pay any more money to the employee. Mr. Hernreich responded that he hadn't gone to ABC "on the basis that he didn't want to stir anything up and that in his business career, as I recall it he mentioned that he realized there had been times when perhaps he had to pay a little money to someone to get some action." Mr. Coe advised him "that was not the way to develop a successful relationship with the network."

20. Mr. Coe further testified that he understood the purpose of the Columbus meeting was to put a stop to what was going on at ABC, but he and Mr. Hernreich disagreed on how to do it. Mr. Coe advised Mr. Hernreich to go to the president of the television network or the president of ABC. Mr. Coe offered to go to the president of ABC, but told Mr. Hernreich that if he couldn't use Mr. Hernreich's

name or the name of the employee involved, he had nothing to work with. Mr. Hernreich, however, would not release Mr. Coe from the secrecy pledge and in a number of subsequent telephone requests by Mr. Coe continued to refuse to release him from this commitment. Mr. Coe did not tell Mr. Hernreich he would or would not go to ABC.

21. Mr. Coe felt that this matter could not be occurring without the approval of some people of authority at ABC, and therefore, thought it inadvisable to discuss the matter with anyone in the station relations department. One or two days later he telephoned Mr. Alfred Beckman, vice-president of ABC for Washington who was formerly vice-president of Affiliate Relations. Mr. Coe could not tell Mr. Beckman much due to his pledge to Mr. Hernreich, but testified he did tell him there might be payments by stations to ABC employees to effect contract changes of financial benefit to stations. He suggested that Mr. Beckman should watch new affiliation agreements or amendments as this has happened once and he suspected it was going to happen again. Mr. Beckman acknowledged the conversation with Mr. Coe, but stated that the discussion concerned "disorganization" rather than "impropriety" in the Station Relations Department of ABC. He denied "that any discussion of impropriety between members of ABC or an employee of ABC and an affiliate was ever given to me." In a written report he subsequently stated the following:

> If Bob [Mr. Coe] was trying to intimate to me in any way that he suspected or knew something dishonest was going on in the Station Relations Department he didn't succeed in getting through to me. If he had I would have reported his suspicions immediately to my New York office.

22. After his meeting with Mr. Coe, Mr. Hernreich went to ABC in New York to pursue the rate increase on his own. He thought that if Mr. Sullivan could get the raise, he should be able to get it on his own as he believed it had been promised to him and he had earned it as Station KAIT–TV had reached 10,000 unduplicated homes. Mr. Hernreich testified that Mr. Leasure had informed him when the station reached this figure he would get a raise, but specified no amount.

23. A meeting took place in Carmine Patti's office in October 1970. What transpired at this meeting is also the subject of contradictory testimony. Mr. Hernreich testified "I got to the desk and was indignant now and I started pounding the desk 'where is my raise?' . . . Keeley came in there and I think Beesemyer walked in to say 'Hello.' That is all. He wouldn't stay there very long, a minute or two. Everybody walked in. Klimek came in. Merkle came in. They all came in and said 'Hello' to me and walked around. Some other people came in. They come in and they walk out." He then testified Mr. Patti made a telephone call and 30 or 40 minutes later received a return telephone call following which Mr. Patti told him that he qualified for a $25 raise. Elated, Mr. Hernreich thanked Mr. Patti and called his son, Robert Hernreich to tell him that he obtained a $25 raise. Robert told his father "they cheated you. You are entitled to $75." Mr. Hernreich testified he then asked Mr. Merkle for the contract so that he could sign it and Mr. Merkle said it would be sent in the mail as it took time to draw it up.

24. With reference to this meeting Mr. Carmine Patti testified that Mr. Merkle brought Mr. Hernreich to his office and Mr. Hernreich requested a rate increase. He called Mr. Leonard Feldman in the ABC Research Department and Mr. Feldman told him he would discuss the matter with Mr. Paul Sonkin, also in the Research Department. Mr. Patti testified that Mr. Feldman called him back and said that he and Mr. Sonkin were going over the matter. Mr. Patti informed Mr. Feldman that Mr. Hernreich had another television station ready to go on the air in Fort Smith, Arkansas, which was not yet affiliated with any network and which was "vital" to ABC. Mr. Patti testified that Mr. Feldman was aware of this and thereafter called him back with their conversation being more on Fort Smith than on Jonesboro. Mr. Feldman wanted ABC to get the first opportunity to "pitch" the new station, i.e., seek and affiliation before NBC and would go along with a $25 increase for KAIT–TV. ABC at that time was analyzing markets where it did not have an affiliation and the object was to get a commitment from Mr. Hernreich that ABC would have first chance, but without guaranteeing ABC would be interested. Mr. Hernreich agreed to this. Mr. Patti testified that everyone was coming in and out of his office to greet Mr. Hernreich which was causing a lot of commotion on the floor. Mr. Beesemyer had been coming "in and out of the office" and was "sort of walking up and down the floor." After the conversation in which Mr. Feldman agreed to a raise, Mr. Patti went to Mr. Beesemyer's office and informed him Research had approved a $25 increase. Mr. Beesemyer responded "fine, just tell him and get him out of here." Mr. Patti then returned to Mr. Hernreich and informed him that Research had agreed to the $25 increase, that "you have got it" with the condition "you have to give us first pitch on the Fort Smith thing which he agreed to do." He believes he did not mention Mr. Beesemyer's approval. Following the meeting he instructed Mr. Merkle to put the increase through.

25. Mr. Klimek testified that he recalled attending the October 1969 meeting in Mr. Patti's office at which Mr. Hernreich requested an increase but is not certain he was present throughout the whole of the meeting. Those present in addition to himself were Messrs. Hernreich, Patti, Merkle and possibly Mr. Roberts. Mr. Hernreich was again "pitching for an increase in the network station rate and asking for a review of their performance." He recalled they discussed the data Mr. Hernreich presented and told him it would be turned over to Research for development. He had no recollection of Mr. Beesemyer being present or coming in during the meeting. In his presence no ABC employee indicated to Mr. Hernreich that KAIT–TV qualified for or would receive a rate increase.

26. Mr. Feldman testified that he had no recollection of a telephone inquiry regarding KAIT–TV by Mr. Patti in October 1969. He recalled a request for an examination of KAIT–TV's rate, but does not recall when or by whom it was made. He discussed it with Mr. Sonkin and they prepared a memorandum which was never distributed. Mr. Beesemyer testified that he read Mr. Patti's testimony in this proceeding regarding the October 1969 meeting with Mr. Hernreich, that he was not aware of any such meeting if it occurred, that he did not

in October 1969 approve a rate increase for Station KAIT–TV and that he did not have authority to grant such an increase on his own; he could do so only with the approval of the president of the network.

27. Mr. Hernreich returned to Fort Smith. The contracts did not arrive in the mail. He testified that after about eight to ten days he telephoned Mr. Merkle [4] and asked the whereabouts of the contracts, was told they were "in the works" and he would receive them. Near the end of October Mr. Sullivan telephoned Mr. Hernreich and informed him that there was going to be an AT&T rate increase and, therefore, if KAIT–TV did not get its rate increase by November 1, 1969, it would not get an increase. Mr. Sullivan offered to "expedite" the increase for a fee of $3000. Mr. Hernreich testified as follows regarding his reaction to this call:

> I thought to myself: "Well, here is where the power comes in. Here is where the extortion comes in now." I said: "Let me think it over." I thought it over and I got frightened to death because he could have—The information I leaked to Coe could have leaked out and Sullivan could have heard it and he could have done lot of things with the power he had, the power I thought he had.
>
> I thought, as a self-protective measure, I had better give him his money.

Mr. Hernreich testified that he did not following this call telephone anyone at ABC to inquire whether his contracts had been sent out because he was frightened—afraid that if Mr. Sullivan found out he had "leaked" information to Mr. Coe, Mr. Sullivan might sue him "for one million dollars" by denying it and suing him for having given false information and "it would have cost a lot more money to defend yourself than $3000 in a $1 million lawsuit in legal fees." He further testified as follows:

> Q. Didn't you have a check to prove that you had paid him money?
>
> A. Yes, but suppose he denied it? Suppose he denied everything. I left myself wide open and I got scared to death. I don't know all the things he could have done. I couldn't tell you all, but there are many factors that entered my mind. Lots of things entered my mind at the moment.
>
> You see ghosts. You don't know what it is about. I thought it was best for me to give him his $3000 just as a self-protective measure. That is all. I had my raise.
>
> He called me up and he is the one who put that pressure on me for the $3000. He put the squeeze play on me, in other words.

Mr. Hernreich did not check with AT&T about the rate increase, as he had read about it in the newspaper.

28. Mr. Hernreich and Mr. Sullivan made the same arrangements for this transaction as for the previous one, i.e., they would meet at the Chicago airport. October 28, 1969 Mr. Hernreich had a check drawn on the KAIT–TV account for $3000 payable to cash. He then cashed the check in Fort Smith, because of the previous difficulty in cashing a check in Chicago, and paid the $3000 to Mr. Sullivan in cash at the time of their meeting. The check which Mr. Hernreich cashed to obtain the cash he paid Mr. Sullivan was signed by Johnnie Murry, secretary and bookkeeper for Mr. Hernreich. He informed her it was payment for a consultancy fee. It was entered in the KAIT–TV check register under the code number 408. Code number 408 on the statement of profit and loss represents on the printed form "Legal Ex-

[4] Mr. Merkle died in early November 1969.

pense" with the typed addition "and consultant" appearing on the October 1969 statement with the amount for October being $3000.

29. Mr. Hernreich initially testified that he believed Mr. Sullivan had the contract with him at the meeting in Chicago. Later, however, he recalled that he received the contract under letter purportedly from Mr. Merkle dated November 1, 1969. The letter is as follows:

> In accordance with your conversation with Carmine Patti, enclosed herewith are five copies of the Rate Increase Agreement for KAIT–TV, dated November 1, 1969.
>
> Would you please have all copies properly signed and returned to me for ABC's counter-signature. I will then forward the necessary number of copies for your filing purposes.

Mr. Hernreich signed the agreement and it was returned to ABC by his son Robert Hernreich, but no copies were returned to KAIT–TV by ABC. The ABC files contained an unexecuted copy of the document, but no executed copy could be found. ABC, however, implemented the increase under the following circumstances. Mr. Marfoglia assumed Mr. Merkle's duties following the latter's death and found a discrepancy between the KAIT–TV contract in the station relations file which specified a rate of $100 and the $125 rate being paid KAIT–TV by the Accounting Department. He also found that an amendment of the KAIT–TV rate from $100 to $125 had been prepared and sent to KAIT–TV for signature and returned to ABC for counter-signature, but there was no indication the amendment was countersigned by ABC. Mr. Marfoglia assumed the amendment had been lost during the period after Mr. Merkle's death and before his assumption of Mr. Merkle's duties during which there was no contracts manager. Mr. Marfoglia, therefore, entered in handwriting on the 1969 contract "Rate Inc., Lost effective 5/1/70 rate is $125." He also found that a facility change notice of the increase to $125 had been distributed both internally at ABC and externally to advertising agencies.

30. By April of 1970 Mr. Hernreich learned from newspaper accounts that ABC had discharged Mr. Sullivan. He felt that "he was an extortionist who had finally gotten caught and that it was my information that may have led to it." Subsequently Mr. Coe called Mr. Hernreich and asked to be released from his pledge of secrecy so far as Mr. Hernreich's name was concerned. Mr. Coe wanted to know if Mr. Sullivan was implicated and Mr. Hernreich replied affirmatively, that Mr. Sullivan was the man he had paid off. Mr. Coe said "You know, if I am called before a grand jury, I have to tell the truth." Mr. Hernreich replied: "Bob, if you are called before a grand jury, I expect you to tell the truth." Mr. Hernreich, however, was still afraid to release Mr. Coe from his pledge of secrecy with respect to his name or the name of the station and refused to do so. Mr. Coe testified that Mr. Hernreich at no time told him about the second payment to Mr. Sullivan. Mr. Hernreich testified he had told him of this payment. "Oh, sure, he knew it. A half a dozen or a dozen times." In a letter to ABC dated April 17, 1971, written at Mr. Hernreich's request, Mr. Coe stated that after the first payment "It is my understanding that he did not make any further payments." In the meantime the Commission on March 16, 1970 released its order instituting its inquiry in Docket No. 18811 out of which, as noted in the order of designation

herein, the instant proceeding arose. Mr. Hernreich did not report these matters to the Commission, but as shown herein was called to testify in that investigation. In July of 1970 he was questioned by law enforcement officials from New York, N.Y. and at that time admitted his payments to Mr. Sullivan.

31. ABC also instituted an investigation into payments by affiliates to ABC employees. In April of 1970 it wired and wrote its affiliates requesting their aid in this investigation. The message to the affiliates stated in part:

> During the course of this investigation, we have discovered that two employees in the Station Relations Department engaged in misconduct which resulted in their discharge from our company.[5]
>
> * * * * * * *
>
> We would like to know if you have any information whether any present or former ABC employee directly or indirectly solicited or received from your company or any representative of your company, any payment, gift of substantial value or other consideration such as loans or loan endorsements or guarantees, consulting fees, stock or stock rights.

Neither Mr. Hernreich nor anyone else connected with Station KAIT–TV responded to this inquiry. Mr. Hernreich testified that he assumed they had been received at the station in Jonesboro and were not forwarded to him at Fort Smith. Mr. Robert Hernreich the son of George T. Hernreich is the manager of Station KAIT–TV and testified that he received the wire over the station's TWIX machine and the letter but did not forward them to his father. The letter was either discarded or filed as his father had not informed him about the payments to Mr. Sullivan, so he had no reason to respond to the ABC inquiries.

32. January 12, 1971, ABC wrote Mr. Hernreich and informed him that ABC was rescinding the 5% increase in the rate of compensation and the $25 rate increase the basis being the "improper considerations which produced such changes in the affiliation contract." The letter continued that based on reexamination of the most recent information regarding KAIT–TV's performance, the station's hourly rate would be fixed for the present time at $122. The letter concluded that "The foregoing actions are taken without prejudice to our pending claims for reimbursement of payment unjustly received by your company." Mr. Hernreich responded to the ABC letter of March 11, 1971. Therein he denied any "improper considerations" or "unjust" receipt of compensation from ABC.

33. In his petition for reconsideration and immediate grant of program test authorization (see paragraph 2, *supra*) Mr. Hernreich made the following representations:

> (a) I and my small Station KAIT–TV have always been under the thumb and entirely submissive to the dominant ABC–TV Network, without which we simply could not survive;
>
> (b) I and KAIT–TV were the victims of an extortion by an ABC–TV official or officials who "put the squeeze on us" before we were permited to obtain minor adjustments in our rate and percentage increase that we had long since been entitled to (and much more so beyond that), under any fair and effective application of network-affiliate criteria;
>
> (c) I on my own initiative and expense voluntarily brought the matter of this corruption in the ABC–TV Network to a former and respected official of that Network (Mr. Robert Coe) with the request that he bring it to the attention of the

[5] The two employees were Messrs. Sullivan and Patti.

ABC–TV Network so that it might be exposed and eliminated, an action which I believe had something to do with the ABC–TV Network finally moving against these corruptive elements and eliminating them;

(d) I have throughout cooperated fully and openly with ABC–TV and with law enforcement officials and with FCC in their investigation of that entire and unfortunate situation of which I was the *victim* rather than a wrongdoer.

* * * * * * *

. . . I was the victim of a concerted effort by an ABC–TV agent or agents to extort monies from a small and vulnerable broadcaster who was otherwise being deprived of rate and compensation increases to which he was clearly entitled and which had been promised . . . .

CONCLUSIONS

34. Mr. Hernreich's position in this matter is that he is the innocent victim of an extortion scheme and that bribery cannot be involved as (a) "Sullivan was not a public official which is one of the common law elements of bribery, universally codified" and (b) "Bribery and extortion are mutually exclusive. Consequently a giver who is a victim of extortion, cannot be guilty of bribe giving" citing *People* v. *Dioguardi*, 8 NY 2d 260.

35. Mr. Hernreich also asserts that he "did not have the knowledge of network relations that would enable him to know if he was *actually* getting a fair deal" as there are no regulations or rules requiring the specification of objective criteria by networks in fixing station rates and ABC had no written policies in these areas. It is, therefore, urged that the standards of applicable behavior remain undefined and accordingly "to inflict a penalty in a situation where there are no rules or guidelines would both violate the Administrative Procedure Act and the Commission's own policies." In support of the latter there are cited three instances of remitting of forfeiture for lack of prior Commission or judicial decisions ruling on whether the element of consideration was present under the particular circumstances shown so as to bring the announcements broadcast within the prohibition of Section 1304 of Title 18, United States Code. *Taft Broadcasting Company* 18 FCC 2d 186, *WBRE–TV Inc.* 18 FCC 2d 96, *Bob Jones University* 18 FCC 2d 8.

36. It is further asserted that Mr. Sullivan's conduct is attributable to ABC and "If Mr. Hernreich is penalized, so must ABC" as "Sullivan is the culprit, and it was and is ABC's duty to conduct its affairs in a manner that would insulate potential affiliates and affiliates from Sullivan-types. Although ABC's failure may be mitigated by other circumstances, the victim of its former executive should not be the scapegoat."

37. Stated simply Mr. Hernreich would have the Commission believe that he is the innocent victim of extortion through the wrongful use by Mr. Sullivan of actual or threatened economic loss as, with regard to the first payment, he "feared that if he failed to pay Sullivan, he would not get the raise he deserved and might also lose his affiliation" and as to the second payment he would not get the hourly rate increase he deserved and had earned "after the first of November because of a pending A.T.&T. rate increase." Mr. Hernreich, however, is an experienced broadcaster and experienced in dealing in network affiliations as both his standard broadcast stations have CBS affiliations. At

the time he made the first payment to Mr. Sullivan he had been an ABC television affiliate for almost four years and had personally repeatedly sought an increase in his hourly rate. The record also shows his attendance at both ABC and CBS affiliates meetings. Despite this experience he would also have the Commission believe he had no real understanding of the basis ABC used for computing station compensation and was unaware the reduction in free hours on the first contract and reduction in percentage on the second contract made through written modification of the printed forms were to partially compensate him for the cost of his microwave system. Mr. Coe, however, testified he explained this to Mr. Hernreich at the time of signing this contract and the record shows that the provision of this microwave by Mr. Hernreich was an essential element of reaching an affiliation agreement. Given these circumstances, Mr. Hernreich's experience in network negotiations and the fact that he made no contact with any of the ABC officials with which he had been dealing upon being informed by Mr. Sullivan that for $3000 he could get him an increase in compensation rate, it is concluded that Mr. Hernreich did fully understand the station compensation provisions of his ABC affiliation agreements at the time of this offer by Mr. Sullivan.

38. There is not a single record fact indicating that Mr. Sullivan gave any basis for a belief that Station KAIT–TV might lose its ABC affiliation if the first $3000 payment was not forthcoming. It is concluded that Mr. Hernreich well knew that this was not "the natural way of getting your increase," that he knew the payment was going to Mr. Sullivan personally not to ABC and that no elements of extortion are present. The payment was made solely to dishonestly gain an increase in network revenues and whether Mr. Hernreich was deserving of or entitled to this increase is of no consequence. He was, on the basis of past experience and his actions reflected in the foregoing findings of fact in attempting to secure modification of his affiliation agreement, fully cognizant of the manner for legitimately seeking increased compensation. Having failed in his efforts to achieve increased compensation legitimately he availed himself of the opportunity to do so illegitimately. The manner of the meeting in Chicago, the method of payment and Mr. Hernreich's steps to make said payment appear a legitimate business transaction in the station's books, can lead to no other conclusion.

39. Nor is it of consequence whether criminal bribery is present. The Review Board in its order FCC 72R–4 released January 12, 1972 does term the issues originally specified as "the bribery and misrepresentation issues." The Commission in its order FCC 73–308 released March 21, 1973 referred to "bribery of network officials or any other acts involving moral turpitude relating directly to the operation of a broadcast station." By its proposed conclusions of law the Broadcast Bureau refers to "a bribe payment" to "the second bribery payment," and that Mr. Hernreich was aware "he was paying a bribe" and that "his actions constituted bribery." As asserted by Mr. Hernreich a necessary element of criminal bribery generally is that a public official or elector be one of the parties. This, however, is not a criminal proceeding requiring the establishing of specific technical elements to sustain the action. The dictionary meaning of the word bribe in the sense here

used is "anything, especially money, given or promised to induce a person to do something illegal or wrong." And there can be no question but that Mr. Hernreich's conduct is well within the legal definition of moral turpitude, i.e., conduct contrary to justice, honesty, modesty or good morals, *March* v. *State Bar of California* 210 Cal. 303, 291 Pacific 583.

40. When Mr. Sullivan came back with a second $3000 proposition Mr. Hernreich did become sufficiently concerned to go to his consultant Mr. Coe. Had he followed the advice received, i.e., that he immediately take this information to ABC there may have been no need for the instant proceeding. He, however, refused to go to ABC and repeatedly refused to authorize Mr. Coe to give any meaningful information to ABC. Thus, though he represented to the Commission that "I on my own initiative and expense voluntarily brought the matter of this corruption in the ABC–TV Network to a former and respected official of that Network (Mr. Robert Coe) with the request that he bring it to the attention of the ABC–TV Network so that it might be exposed and eliminated," he deliberately elected to attempt to conceal his complicity thereby precluding Mr. Coe from taking any effective action. This he did not disclose to the Commission and it is concluded that this statement, therefore, does constitute a misrepresentation of the true facts. Mr. Hernreich then elected to compound his complicity by making a second payment to Mr. Sullivan when led to believe he was again going to be unsuccessful in his efforts to legitimately secure an increase in his network compensation.

41. What took place in the meeting of October 1970 in Mr. Patti's office in the light of subsequent developments is of no consequence. Mr. Hernreich and Mr. Patti testified that it was agreed that a $25 increase in hourly rate was agreed to. Messrs. Klimek, Feldman and Beesemyer testified that to the best of their knowledge no such agreement was reached and in the light of all the evidence it is concluded that no valid agreement was ever executed by ABC. It may be that Mr. Patti did lead Mr. Hernreich to believe the increase in compensation had been authorized fearing disclosure of the previous payment made by Mr. Hernreich or as part of a continuing plan on his and Mr. Sullivan's part to secure the second payment. Due to a series of coincidences triggered by Mr. Merkle's death and through the assurances of Mr. Patti to Mr. Merkle's successor the increase did become effective following the second payment to Mr. Sullivan. Here, as in the first instance it also is of no consequence whether Mr. Hernreich was entitled to this increase. The only matter of consequence is that when the increase in hourly compensation was not shortly forthcoming Mr. Hernreich again resorted to a pay-off of $3000 to Mr. Sullivan to secure this increase and he admits at this point he knew the payment was going to Mr. Sullivan, not ABC. Again there not an iota of evidence indicating that Mr. Sullivan gave any basis for a belief that Station KAIT–TV might lose its affiliation if the payment was not made. Whether such conduct be termed bribery or merely moral turpitude is of no materiality. It is conduct that must lead to denial of the license applications here in issue. To condone such conduct would be a disservice to the public, to the industry and to effectuation of the functions of this Commission. To grant the license applications would

be condonation of these actions. It, therefore, is concluded that George T. Hernreich lacks the requisite qualifications to be a licensee of the Commission and grant of the renewal applications would be contrary to the public interest, convenience and necessity.

42. Though Mr. Hernreich contends that ABC is equally responsible for these transactions due to its failure "to conduct its affairs in a manner that would insulate potential affiliates and affiliates from Sullivan-types" that is not a matter for this proceeding. Whatever ABC's obligations they cannot serve to exculpate Mr. Hernreich from the consequences of his actions.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the applications herein of George T. Hernreich for license to cover construction permit for Station KFPW–TV and for renewal of license of Station KAIT–TV are denied.

FEDERAL COMMUNICATIONS COMMISSION,
FOREST L. MCCLENNING, *Administrative Law Judge.*

APPENDIX A

BROADCAST BUREAU'S BILL OF PARTICULARS

The Chief Broadcast Bureau, pursuant to the Commission's directive in its *Memorandum Opinion and Order* of July 29, 1971 (FCC 71–768), specifies the following particulars with respect to Issues 1 and 2.

1. *Issue 1 a.* In May, 1969 Thomas G. Sullivan, an employee of American Broadcasting Companies, Inc. and George Hernreich, licensee of KAIT–TV, Jonesboro, Arkansas, had conversations concerning the network compensation paid to KAIT by ABC and the possibility of having it increased. Pursuant to these conversations Hernreich, on or about June 6, 1969, drew a check on the Mercantile Bank of Jonesboro, Arkansas for the amount of $3,000 payable to the Merchant's National Bank. On or about June 9, 1969, Hernreich met Sullivan in Chicago, Illinois and delivered the check to him and aided him in cashing said check. In return for the $3,000 payment, and pursuant to their conversations, Sullivan delivered to Hernreich a new primary affiliation contract for a network station rate of $100, 11 free hours, and a compensation rate of 35%. This contract represented an increase of 5% in KAIT–TV's rate of compensation.

b. In October, 1969 Sullivan and Hernreich again had conversations about the possibility of having the total compensation paid to KAIT–TV by the ABC network increased. On or about October 28, 1969 a check was drawn by Hernreich's bookkeeper for the amount of $3,000 payable to cash. Hernreich cashed the check and on or about October 29, 1969 delivered the $3,000 in cash to Sullivan in Chicago, Illinois. Hernreich then purportedly received a new primary affiliation contract which increased his network station rate to $125.

2. *Issue 2 a.* On July 12, 1971, Hernreich filed with the Commission a petition seeking reconsideration of a Commission decision denying program test authorization for KFPW–TV, Fort Smith, Arkansas. In this petition, Hernreich alleged that: I on my own initiative and expense voluntarily brought the matter of this corruption in the ABC–TV Network to a former and respected officer of that Network (Mr. Robert Coe) with the request that he bring it to the attention of the ABC–TV Network so that it might be exposed and eliminated, an action which I believe had something to do with the ABC–TV Network finally moving against these corruptive elements and eliminating them;

On May 6, 1971 Hernreich testified in Docket 18811. At that time Hernreich testified in accordance with the above-quoted statement (Tr. 2509; 2512–14). The Commission has information, however, which shows that although such a meeting took place, Hernreich refused to allow Coe to bring this matter to the

attention of ABC executives in any meaningful manner and swore him to secrecy about the situation.

b. In the same petition, Hernreich alleged that: I have throughout cooperated fully and openly with law enforcement officials and with FCC in their (sic) investigation of that entire and unfortunate situation of which I was the *victim* rather than a wrongdoer (emphasis in original).

Hernreich's own testimony in Docket 18811 states that even after the Sullivan affair had appeared in the papers, Hernreich never reported his dealings with Sullivan to the Commission, or to any law enforcement officials. Hernreich's cooperation came only after he had been told by the authorities that they were cognizant of his dealings with Sullivan. Prior to this Hernreich had kept his dealings with Sullivan a well protected secret (Tr. 2540–2; 2543–A–4; 2552–4).

c. In this same petition, Hernreich alleged that: . . . I was the victim of a concerted effort by an ABC–TV agent or agents to extort monies from a small and vulnerable broadcaster who was otherwise being deprived of rate and compensation increases to which he was clearly entitled, and which had been promised; . . .

Hernreich's testimony in Docket 18811 is in accordance with the above-quoted statement (Tr. 2526–7; 2539). The Commission has information, however, that at no time was KAIT–TV promised an increase in its rate of compensation and/or network station rate, with the exception of Sullivan's promise.

Respectfully submitted,

THOMAS B. FITZPATRICK,
Chief, Hearing Division.

October 27, 1971.

FCC 74-770

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 89, 91, AND 93 OF THE RULES TO REALLOCATE LAND MOBILE CHANNELS IN THE 470–512 MHz BAND IN THE NEW YORK AND LOS ANGELES URBANIZED AREAS	Docket No. 20109

NOTICE OF PROPOSED RULEMAKING

(Adopted July 16, 1974; Released July 25, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. On June 22, 1971, we issued a Report and Order in Docket 18261 which amended Parts 89, 91, and 93 of our Rules to reflect the suballocation of 12 MHz of spectrum space in the 470–512 MHz band. In deciding how the additional spectrum space would be apportioned, our basic purpose was to provide for the immediate and most urgent requirements in the areas concerned. To this end, and to preserve a degree of flexibility in making further allocation adjustments, we established several pools, including two "reserve pools," instead of attempting to divide the space among the specific land mobile radio services.

2. The pooling concept was designed to achieve flexibility and the "reserve pools" were intended to permit adjustments to meet urgent needs as they developed. These frequencies have been available for over two years and we have seen fairly rapid application increases, in some services and in some, but not all, of the areas where the frequencies in the 470–512 MHz are available. A year ago we made the first reallocation to relieve congestion in certain services in the New York and Washington, D.C. urbanized areas.

3. We are now witnessing a similar situation with respect to the Business Radio Service in Los Angeles and again in New York. We believe, as we said at the time of the New York/Washington reallocation that it is unwise to wait until all frequencies are fully loaded before reallocating and are therefore proposing a further reallocation.

4. Specifically, we now propose to reallocate frequencies in the band 470–512 MHz in the two urbanized areas as follows:

(a) *New York, N.E. New Jersey*

Increase the number of Business Radio Service channels from 56 to 74, an increase of 32 percent. This includes the 14 channels in the reserve pool and four channels from the Petroleum, Forest Products, Manufacturers pool, a reduction of 50 percent.

(b) *Los Angeles, California*

Increase the number of Business Radio Service channels from 44 to 64, an increase of 45 percent. This includes 12 adjacent Reserve Pool B channels and 8 adjacent Taxicab channels. Reduce the number of Petroleum, Forest Products, Manufacturers channels from 16 to 8, a reduction of 50 percent. Reallocate 8 channels from Petroleum; Forest Products, Manufacturers to Taxicab Radio Service.

These changes, we believe, result in minimum dislocation while providing the Business Radio Service with needed space for expansion. The exact frequencies involved are set forth in the attached appendix.

5. Recently we conducted a survey and tabulated the geographic locations of all stations in the Business Radio Service in the 470–512 MHz range in the Los Angeles urbanized area. The survey brought into focus two points that had not previously been completely apparent. One was that almost all of the licensees employ mobile relays and the second was that most of the mobile relays are situated on just three transmitter sites. These sites are Sierra Peak to the southeast and Mt. Lukens to the north at elevations of 3045 and 5040 feet respectively and a third site just eastward of Mt. Lukens at an elevation of almost 2000 feet ASL (above sea level). Stations on these peaks blanket the Los Angeles area and thereby diminish possible use of the channels elsewhere in the 50 mile circle centered on Los Angeles. The 40 mile re-use policy is thereby largely derogated.

6. Since the built-up area of Los Angeles is relatively flat and is surrounded by hills to the north and east with ocean to the south and west, the HAAT (height above average terrain) calculation for either of the aforementioned sites is badly skewed by inclusion of heights in the computation over 180° of the compass where coverage is neither needed nor desired but which must be included under the present rules. But including these points of high terrain brings the HAAT of Mt. Lukens down to 2579 feet and permits use of 100 watts ERP (effective radiated power). Similarly, at Sierra Peak, 165 watts ERP is permitted.

7. With the foregoing in mind, we propose to use coverage curves (or charts) based on power and antenna height somewhat the same as the curves now used relating land mobile power and antenna height to TV protection and comparable to those now used in the Chicago, Illinois Regional Area. We have no intention of changing the TV protection ratios in any way, however. Using a conservative receiver sensitivity figure of .45uv (across 50 ohms) to produce a 12 dB SINAD,[1] we believe a reasonable signal strength for reliable communication would be on the order of 5 microvolts across 50 ohms, i.e., 20 dB above threshold. The coverage curves or charts would be based on the R–6602 curves. The objective of this would be to enable re-use of a frequency 40 miles from the site of its initial use. Our intention is not to deny use of desirable high transmitter sites to users but merely to limit field strengths at great distances from such sites and to thereby permit multiple use of a given channel within urbanized areas as

[1] The usable sensitivity of a receiver is the minimum value of input signal level from a standard signal source which, with standard test modulation, will produce at least 50% of the receiver's rated audio power output with 12 dB signal + noise + distortion to noise + distortion ratio (SINAD).

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already provided for in the Rules. Under this approach, the power levels to be assigned will be based on the height above average terrain in the station's primary area of coverage.

8. We also are proposing to incorporate into our rules a practice with respect to assigning frequencies for community repeater use. We propose to require in the initial application for a channel in the Business Radio Service that the applicant indicate whether or not the station is to be a shared facility (community repeater). If so, for a reasonable period thereafter, perhaps as long as 18 months, efforts will be made to assign the same frequency only to applicants proposing to share the use of the facility. If the channel is not saturated in accordance with our frequency loading standards within such period, it will be assigned for use in other facilities. The channel would also be reassigned earlier if other frequency alternatives are not reasonably available. Applicants after the first proposing to use a community repeater would be required to supply the call signs of all other licensees using the station. The appendix contains rule changes to accomplish this.

9. From time to time, we receive an application requesting an authorization for a control station far beyond the range of mobile units associated with the mobile relay station. While practical considerations in each case may influence an applicant in choosing such distant location, it is contrary to the basic policy we have established with respect to mobile areas of operation. The control station is considered to be like a mobile unit but at a specific location and, indeed, could be such a unit. We wish to clarify the policy on this matter and to dispell any misunderstanding there may be with respect to where control stations may be located.

In processing applications we will follow the general rule that a control station must be within the area of mobile operation and, in any event, an application will be returned if the proposed control station will be more than 30.5 miles from the associated mobile relay station.

10. We have noted a reluctance on the part of certain eligibles under Part 93 to use the frequencies of the Land Transportation pool in the 470–512 MHz band. On the other hand, a number of entities eligible for those frequencies have sought assignments in the Business Radio Service pool. This has apparently come about because those users may not use the mobile relay mode of operation on frequencies allocated to their services. Accordingly, we now propose adopting rules which would permit all Part 93 users to operate mobile relay stations in the 470–512 MHz range. The appendix contains the proposed rule modification.

11. In order to insure that applications filed do not limit our ability to make the adjustments outlined in the foregoing paragraphs, we will hold action on applications that involve frequencies being reallocated until this proceeding is concluded. We will, however, handle the rule making on an expedited basis so as to limit the impact on users, and at the same time provide the adjustments we think are needed.

12. Authority for the proposed amendment is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before

August 20, 1974, and reply comments on or before September 5, 1974. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments by this Notice.

13. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and fourteen copies of all statements, briefs, or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Parts 91 and 93 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 91, Industrial Radio Services

1. In Section 91.58 a new paragraph (d) is added to read as follows:

§ 91.58 SUPPLEMENTAL INFORMATION TO BE SUBMITTED WITH APPLICATION.

* * * * * * *

(d) Each application for authority to operate on any frequency in the range 470–512 MHz shall be accompanied by a statement indicating whether or not the proposed station will be used by more than one licensee. When an applicant plans to participate in such a common facility he must submit the names and call signs of all existing users of the facility.

* * * * * * *

2. In Section 91.114 the tabulation under paragraph (h) is amended and a new paragraph (j) is added as follows:

§ 91.114 FREQUENCIES IN THE BAND 470–512 MHz.

* * * * * * *

(h) * * *

Channel 14

Special Industrial		Business		Petroleum-Forest Products Manufacturing	
Base	Mobile	Base	Mobile	Base	Mobile
471.4375	474.4375	471.6625	474.6625	472.9125	475.9125
[1] 471.6375	474.6375	472.3375	475.3375	472.9375	475.9375
		and			
----------	----------	472.6875	475.6875	----------	----------
----------	----------	472.8375	475.8375	----------	----------

[1] Correction.

Channel 15

Business		Petroleum-Forest Products Manufacturing	
Base	Mobile	Base	Mobile
477.6625	480.6625	478.9125	481.9125
478.3375	481.3375	478.9375	481.9375
and			
478.6875	481.6875	----------	----------
478.8375	481.8375	----------	----------

* * * * * * *

(j) Frequencies available for assignment in the Los Angeles, California urbanized area:

Channel 15

Power Telephone Maintenance		Petroleum-Forest Products Manufacturing	
Base	Mobile	Base	Mobile
471.3125 to 471.4125	474.3125 to 474.4125	472.8125 to 472.8875	475.8125 to 475.8875

Special Industrial		Business	
Base	Mobile	Base	Mobile
471.4375 to 471.6375	474.4375 to 474.6375	471.6625 to 471.4375	474.6625 to 474.4375

Channel 20

Power Telephone Maintenance		Petroleum-Forest Products Manufacturing	
Base	Mobile	Base	Mobile
507.3125 to 507.4125	510.3125 to 510.4125	508.8125 to 508.8875	508.8125 to 511.8875

Special Industrial		Business	
Base	Mobile	Base	Mobile
507.4375 to 507.6375	510.4375 to 510.6375	507.6625 to 508.4375	510.6625 to 511.4375

B. Part 93, Land Transportation Radio Services

3. In § 93.114(a) a new sub-paragraph (8) and a new paragraph (h) is added as follows:

* * * * * * *

(8) The mobile relay mode of operation may be authorized for any licensee in the land transportation radio services.

* * * * * * *

(h) Frequencies available for assignment in the Los Angeles, California urbanized area:

Channel 14

Taxicab		R. R-Motor Carrier Automobile Emergency	
Base	Mobile	Base	Mobile
472.9125 to 472.9875	475.9125 to 475.9875	472.4625 to 472.7875	475.4625 to 475.7875

Channel 20

Taxicab		R. R-Motor Carrier Automobile Emergency	
Base	Mobile	Base	Mobile
508. 9125 to 508. 9875	511. 9125 to 511. 9875	508. 4625 to 508. 7875	511. 4625 to 511. 7875

FCC 74-806

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF RULES PART 15 SUBPART E—LOW POWER COMMUNICATION DEVICES—TO DELETE THE FREQUENCY BAND 26.97–27.27 MHz. TO ADD THE FREQUENCY BAND 49.9–50.0 MHz AND TO PROMULGATE TECHNICAL SPECIFICATIONS	Docket No. 20119

NOTICE OF PROPOSED RULEMAKING

(Adopted July 23, 1974; Released July 31, 1974)

BY THE COMMISSION:

1. Notice is hereby given of proposed rule making in the above entitled matter.

2. The Communications Act of 1934, as amended, provides for the control by the Federal Government of all the channels of interstate and foreign radio communication. To maintain this control, the Commission has established various classes of service under which radio transmission equipment may be operated in accordance with Commission regulations and under the terms of a specific license granted by the Commission. In addition, the Commission has promulgated regulations in Part 15 of its rules which set out the conditions under which a miniature transmitter—a low power communication device—may be operated without an individual license.

3. One of the licensed services established by the Commission is the Citizens Radio Service—Part 95. Class D stations in this service are authorized to operate in the band 26.96–27.23 MHz. Low power communication devices under Part 15 are authorized to operate in the band 26.97–27.27 MHz—essentially the same band as that used by the Class D Citizens Radio Stations. Devices commonly used in this band, which is available for use under both Part 15 and Part 95, include radio toys, equipment for short distance communications and control or telemetry equipment. This shared use of the same frequencies has resulted in the following problems:

(a) Confusion as to which devices require licenses. Both the users and the manufacturers of the devices experience this difficulty.

(b) Enforcement problems for the Commission. The use of the same band of frequencies for both Part 15 and Part 95 operations makes it extremely difficult to identify and differentiate between permitted and prohibited operations.

(c) Interference to licensed services. In many cases, Part 15 devices have been found to be the source of interference to licensed operations under Part 95.

The Commission has previously considered amending this frequency allocation in a Notice of Proposed Rule Making in Docket Number 17364, FCC 67–431, 32 FR 6145 of April 19, 1967, which was recently terminated, since the data in the docket were out of date. However, as part of the Commission's review of the Citizens Radio Service, this problem area is being considered anew.

4. It is the Commission's experience that many people, users (purchasers) as well as dealers (vendors), confuse Class D transmitters which require a license under Part 95 with low power communication devices which may be operated without an individual license under Part 15. The confusion stems in large measure from the fact that in many instances the external appearance of these devices is virtually the same. The result is that many Class D transmitters never are licensed because the purchaser and vendor do not understand that a license is required. Conversely, many purchasers of low power communication devices may be needlessly obtaining licenses because of this confusion.

5. Further, this shared use of the frequency band has created an enforcement problem for the Commission. When as a result of monitoring observations, the Commission has determined that a transmitter is being operated at a power level considerably above 100 milliwatts[1] and has charged that operator of the transmitter with unlicensed operation of a Class D Citizens Radio Station in violation of Section 301 of the Communications Act of 1934, the operator has claimed that a Class D station license is not required because he was operating a Part 15 device. Although such an allegation cannot be substantiated, it nevertheless confronts the Commission with a difficult enforcement problem.

6. Another problem caused by the shared use of the 27 MHz band is the interference produced by the essentially unregulated Part 15 devices to the operations of the regulated Class D stations. Part 15 had been intended to provide a maximum freedom of operation with a minimum of regulation. To achieve this result while at the same time protecting the licensed services from harmful interference, Part 15 sets out a basic requirement that a device operating under these regulations must accept such interference as it may receive and may not cause harmful interference to the operation of any licensed radio station. However, our experience has been that this regulation is more frequently breached than it is observed.

7. The interference situation thus revealed appears to negate the basis for nonlicensed operation under Part 15. Such nonlicensed operation is authorized on the premise that technical standards can be established which, if met, will preclude the likelihood of interference to the channels of interstate communication. The interference situation that has arisen between the nonlicensed Part 15 devices and the

[1] The power limit for a Part 15 low power communications device operating in the band 26.97–27.27 MHz is 100 milliwatts input to the final RF stage. The power limit for a licensed Class D Citizens Radio Station is 4 watts carrier power for AM and 12 watts peak envelope power for SSB.

licensed Citizens Radio stations makes it necessary to reappraise the regulations which now permit nonlicensed operation of Part 15 devices in the band 26.97–27.27 MHz.

8. As was pointed out above, the shared use of the 27 MHz band has posed a formidable enforcement problem for the Commission. As a first step toward resolving this problem, we propose to separate the nonlicensed Part 15 operation from the licensed Citizens operation. Under the proposal, the 27 MHz frequencies would be retained for licensed Citizens Radio Stations. The nonlicensed Part 15 devices, both voice operated and control devices, would be moved to the band 49.9–50.0 MHz, which is and which would continue to be allocated nationwide for use by the U.S. Government. Part 15 devices will be permitted to use this band on a sufferance basis and, like all other devices accommodated under Part 15 of the Commission's Rules, would be subject to the conditions of Section 15.3. This regulation provides that a person operating a Part 15 device shall not acquire a vested right to the continued use of any given frequency because of such operation. The regulation provides further that operation of a Part 15 device may not cause harmful interference.

9. The regulations in Part 15 for operation at 27 MHz had been intended to permit the use of low cost equipment to provide a short range communication facility primarily for radio toys and hobby use, although a substantial number of these devices are used for essential business communications. This objective can be readily achieved at 50 MHz today. Moreover, the developments in component and manufacturing techniques makes it feasible today to meet stricter technical specifications without any undue increase in cost. It is thus possible to more closely implement the policy set out in paragraph 7, to set technical standards, which if met, will preclude the likelihood of harmful interference.

10. In proposing technical limitations we recognize that there will be two categories of equipment operating in the 50 MHz Band: those devices manufactured for sale to the general public and those built by a person for his own use. While many of the technical limitations are the same for these two categories others are different. The requirements with respect to frequency tolerance, that the device be self contained and the prohibition against the use of superregenerative receivers are the same. Power limitations, certification and identification requirements are different.

11. The difference in the power limitation is based on the fact that a device which is widely marketed to the general public has a much greater potential for interference than a device built by an individual for his own use. Since the interference potential is directly related to the field strength of the radiated signal, the power limit for a device manufactured for sale is a field strength limit of 10,000 μV/m at 3 meters. While it would be desirable to impose this limit also on home built devices, we recognize that a requirement for the measurement of field strength is beyond the capability of the average hobbyist or experimenter. For home built equipment, we have accordingly imposed a limit of 100 milliwatts measured at the battery or power line terminals, under any condition of modulation.

12. Similarly, devices manufactured for sale to the public will require bilateral certification under the procedural rules recently promulgated by the Commission.[2] If the device is a transceiver, a single application will suffice. The report of measurements submitted with this application must show that the device complies both with the transmitter requirements and the receiver requirements. If the device uses separate transmitters and receivers (as for control or telemetry), the transmitter and the receiver will require individual certification. On the other hand, home built devices will require self-certification, since the application fees and expense involved in preparing a detailed report of measurements are not justified when an individual builds devices for his own use.[3]

13. The Commission proposes to establish the following time schedule for the transition from the 26.97–27.27 MHz band to the band 49.9–50.0 MHz.

(a) Manufacture of devices to be terminated in one year.
(b) Marketing devices to be terminated in two years.
(c) Operation of devices to be terminated in seven years.

All dates are with respect to the effective date of the rules for operation in the band 49.9–50.0 MHz that the Commission expects to promulgate in this proceeding. Devices mentioned in paragraphs (a), (b) and (c) are devices operating without an individual license in the band 26.97–27.27 MHz. Notwithstanding the above, manufacturers are urged to terminate the production of such devices at an earlier date than that specified and thus help to expedite the transition from the band 26.97–27.27 MHz to the band 49.9–50.0 MHz.

14. The band 49.9–50.0 is allocated for the use of U.S. Government radio operations. Accordingly, this proposal was coordinated with the U.S. Government which did not object to the proposed use by devices operating under Part 15 under the usual limitations inherent in such use, namely, that this band is used on a sufferance basis only with no claim to a vested right in the use of these frequencies by reason of such use and under technical limitations designed to minimize the interference potential of such devices.

15. The proposed amendments are set out in an appendix to this Notice. Authority for the adoption of the amendments herein proposed is contained in Section 4(i), 302 and 303(r) of the Communications Act of 1934, as amended.

16. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's rules, interested persons may file comments on or before September 30, 1974, and reply comments on or before October 14, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision on the rules of general applicability which are proposed herein, the Commission also may take into account other relevant information before it, in addition to the specific comments invited by this Notice.

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[2] Subpart J of Part 2; 47 CFR 2.901–2.1065 inclusive; 39 FR 5912, February 15, 1974.
[3] The proposed rules would limit the individual to the construction of not more than five devices.

17. In accordance with the provisions of Section 1.419 of the Commission's rules and regulations, an original and 14 copies of all statements, briefs, or comments shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

It is proposed to amend Part 15 as follows:

1. Section 15.201 is amended by revision of paragraph (a) to read as follows:

§ 15.201 FREQUENCIES OF OPERATION

(a) A low power communication device may be operated on any frequency in the bands 10–490 kHz, 510–1600 kHz and on frequencies specified in Section 15.280 of this part in the band 49.9–50.0 MHz. Operation in the band 26.97–27.27 MHz is subject to the conditions set forth in Section 15.205 of this part.

* * * * * * *

2. Section 15.205 is amended by the addition of paragraphs (e), (f) and (g) to read as follows:

§ 15.205 OPERATION WITHIN THE FREQUENCY BAND 26.97–27.27 MHz.

* * * * * * *

(e) Manufacture of devices for operation in this band shall be terminated not later than (see Note 1).

(f) Marketing of devices for operation in this band shall be terminated not later than (see Note 2).

(g) Operation of devices in this band shall be terminated not later than (see Note 3).

NOTE 1: The date to be inserted will be one year after the effective date of rules promulgated in this proceeding.

NOTE 2: The date to be inserted will be two years after the effective date of rules promulgated in this proceeding.

NOTE 3: The date to be inserted will be seven years after the effective date of rules promulgated in this proceeding.

3. New Sections 15.280–15.283 inclusive are added to read as follows:

§ 15.280 OPERATION WITHIN THE FREQUENCY BAND 49.9–50.0 MHz.

A low power communication device may be operated within the band 49.9–50.0 MHz provided it complies with the following requirements:

(a) The device shall operate on one or more of the following frequencies: 49.91 MHz, 49.93, 49.95, 49.97, 49.99.

(b) The carrier frequency of the device shall be maintained within ±0.01% of the operating frequency. This tolerance must be maintained over the temperature range −20°C to +50°C and for a variation in the primary supply voltage from 85% to 115% of the rated supply voltage.

(c) Emissions shall be confined within a 20 kHz band centered on the operating frequency listed in paragraph (a) of this section.

(d) The operating power of the transmitter part of the device shall comply with either subparagraph (1) or (2), as appropriate.

(1) *Device built for sale to the public.* The field strength of the emitted signal shall not exceed 10,000 μV/m at 3 meters.

(2) *Home built devices in a quantity of 5 or less and not for sale.* The power input to the device measured at the battery or the power line terminals shall not exceed 100 milliwatts at any condition of modulation.

(e) The out-of-band emissions for a device built for sale to the public shall comply with the following:

(1) On any frequency between 10 and 20 kHz removed from the carrier, the emission shall not exceed 500 μV/m at 3 meters.

(2) On any frequency more than 20 kHz removed from the carrier, the emission shall not exceed 100 μV/m at 3 meters.

(f) For a home built device (pursuant to paragraph (d) (2) of this section), the antenna shall be a single element 1 meter or less in length, permanently mounted on the box containing the device.

(g) The device shall be completely self-contained with the antenna permanently attached to the box containing the device. If a microphone is used it shall be built into the box. No remote operating position is permitted.

(h) The receiver associated with or part of this device shall not use superregeneration and shall comply with the radiation requirements in Section 15.63. If designed to operate from public utility power lines, the conducted energy fed back into the power lines by the receiver shall not exceed 100 microvolts on any frequency below 25 MHz.

(i) The device shall be certified pursuant to Section 15.281 or 15.283 and shall be identified pursuant to Section 15.282 or 15.283.

§ 15.281 Certification Required for Device Offered for Sale.

A low power communication device operative in the band 49.9–50.0 MHz which is offered for sale shall be certificated pursuant to the procedures set out in Subpart J of Part 2 of this chapter.

§ 15.282 Identification Required for Device Offered for Sale.

A low power communication device operative in the band 49.9–50.0 MHz which is offered for sale shall be identified pursuant to Section 2.1045 of this chapter. The date of manufacture shall be shown on the label.

§ 15.283 Certification and Identification Required for Home Built Devices.

A person who constructs not more than five low power communication devices for operation in the band 49.9–50.0 MHz for his own use and not for sale shall attach to each such device a signed and dated label that reads as follows: I have constructed this device for my own use. I have tested it and certify that it complies with the applicable regulations of FCC Rules Part 15. A copy of my measurements is in my possession and is available for inspection.

_____ _____

(Signature) (Date)

FCC 74-772

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LVO CABLE, INC., BOISE, IDAHO	CAC-220 ID056
LVO CABLE, INC., PAYETTE, IDAHO	CAC-221 ID057
LVO CABLE, INC., NEW PLYMOUTH, IDAHO	CAC-222 ID066
LVO CABLE, INC., EMMETT, IDAHO	CAC-223 ID058
LVO CABLE, INC., GARDEN CITY, IDAHO	CAC-224 ID059
LVO CABLE, INC., PARMA, IDAHO	CAC-225 ID060
LVO CABLE, INC., VALE, OREG.	CAC-226 OR160
LVO CABLE, INC., FRUITLAND, IDAHO	CAC-227 ID061
LVO CABLE, INC., WEISER, IDAHO	CAC 228 ID062
LVO CABLE, INC., ONTARIO, OREG.	CAC-229 OR159
LVO CABLE, INC., CALDWELL, IDAHO	CAC-230 ID063
LVO CABLE, INC., MERIDIAN, IDAHO	CAC-231 ID064
LVO CABLE, INC., NAMPA, IDAHO	CAC-232 ID065
LVO CABLE, INC., NYSSA, OREG.	CAC-233 OR158
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 25, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING

1. LVO Cable, Inc., has filed applications for certificates of compliance to commence cable television service at the above-listed communities.[1] LVO proposes to carry the following television broadcast signals:

KBOI-TV (CBS, Channel 2) Boise, Idaho
KTVB (NBC, Channel 7) Boise, Idaho
KAID (Educ., Channel 4) Boise, Idaho
KUTV (NBC, Channel 2) Salt Lake City, Utah
KCPX-TV (ABC, Channel 4) Salt Lake City, Utah
KSL-TV (CBS, Channel 5) Salt Lake City, Utah
KWGN-TV (Ind., Channel 2) Denver, Colorado

[1] All of the communities are located within the smaller television market of Nampa, Idaho, with the exception of Weiser and Payette, Idaho, and Vale and Ontario, Oregon, which are located outside of all markets. The populations of the subject communities are as follows:

Boise	74,990	Fruitland	1,576
Payette	4,521	Weiser	4,108
New Plymouth	986	Ontario	6,483
Emmett	3,945	Caldwell	14,219
Garden City	2,368	Meridian	2,616
Parma	1,228	Nampa	20,768
Vale	1,383	Nyssa	2,609

In addition to the signals listed above, those communities located outside of all markets will carry the following signals:

KATU (ABC, Channel 2) Portland, Oregon
KGW–TV (NBC, Channel 8) Portland, Oregon
KOIN–TV (CBS, Channel 6) Portland, Oregon
KPTV (Ind., Channel 12) Portland, Oregon
KOAP–TV (Educ., Channel 10) Portland, Oregon

Oppositions to the applications have been filed by KTVB, Inc., licensee of Television Broadcast Station KTVB (Channel 7), Boise, Idaho; Boise Valley Broadcasters, Inc., licensee of Station KBOI–TV (Channel 2), Boise, Idaho; Idaho Television Corporation, permittee of Television Broadcast Station KIVI (Channel 6), Nampa, Idaho, and LVO has replied.

2. In its opposition, KTVB argues that: (a) the franchises for the subject communities are inconsistent with the franchise standards of Section 76.31 of the Commission's Rules because (i) they provide for a 4 percent annual franchise fee for the first two years and 3 percent for the next three years; (ii) the franchise duration is 20 years; (iii) the franchises require LVO to commence construction "no later than 30 days after it receives final approval to establish or use a microwave facility to bring in at least the following: the nearest commercial independent station, at least one educational station, and ABC-, CBS-, and NBC-affiliated stations other than KBOI–TV and KTVB"—a clause which, KTVB argues, conflicts with the construction timetables set forth in Section 76.31(a)(2) of the Rules and which requires signal carriage which is prohibited by Section 76.59; (b) the applications contain no equal employment opportunity statement as required by Section 76.13(a)(8) of the Rules; (c) the distant signal carriage provisions of Section 76.59 should be applied to all 14 of the LVO systems regardless of whether they are located within a smaller television market or are outside of all markets since the cable systems will be operated as a single unified system throughout the area, with a common headend and identical ownership; (d) the distant independent station authorized in the communities should be KPTV, Portland, Oregon, and not KWGN–TV, Denver, Colorado, because the communities have a closer bond with Portland which is 340 miles from Boise than with Denver which is 640 miles from Boise; (e) because of LVO's widespread cable interests, action on the pending applications should be deferred pending resolution of the multiple ownership rulemaking proposal in Docket No. 18891; (f) LVO should be required to provide KTVB syndicated program exclusivity; (g) LVO should be required to make a full disclosure of any plans for its carriage of distant closed-circuit programming.

3. KTVB has also filed a Petition for Special Relief [2] which requests: (a) that the LVO cable systems provide KTVB same-day instead of simultaneous network program exclusivity; [3] (b) that the perimeter of the Boise market specified zone be extended so that it

[2] KTVB's Petition for Special Relief was filed along with its original objection to LVO's application on June 2, 1972. A supplement to this petition was filed June 6, 1974, wherein KTVB requested the relief described in (c) below.

[3] Pursuant to Section 76.93 of the Rules, stations licensed to communities in the Mountain Standard Time Zone are entitled to same-day network program exclusivity thereby rendering this request moot.

encompasses all 14 of the LVO communities; and (c) that each of the 14 communities be required to comply with the network program exclusivity provisions of Sections 76.91 and 76.93 of the Rules without regard to the exemption found in Section 76.95(c) of the Rules.[4] In support of the relief sought in (b) above, KTVB argues that in the Rocky Mountain states, the 35-mile specified zone is unrealistic because of the widespread, sparsely populated areas which television stations must reach to be viable and thus seeks to have the Boise specified zone defined as the KTVB city grade contour. In support of the relief sought in (c) above, KTVB argues that Section 76.95 is intended to apply to the very small and independently operated cable systems with fewer than 500 subscribers, rather than to a series of small cable systems linked together in an integrated pattern with common ownership, and a common headend, which will have more than 500 total subscribers in the entire operation but possibly less than 500 subscribers in several of the individual communities.

4. In its Petition for Special Relief, KBOI–TV requests that: (a) the specified zone of the Boise market be extended to the Grade B contour of the Boise television stations; (b) the syndicated program exclusivity provisions of section 76.151 be applied to the Boise market.

5. In addition to their arguments raised in paragraphs 2 and 3 above, KTVB and KBOI–TV, along with Idaho Television Corporation, permittee of Television Broadcast Station KIVI, Nampa, Idaho, object to the signal carriage proposals of LVO. These parties argue that they are full network stations, NBC, CBS, and ABC, respectively, within the meaning of Section 76.5(l)[5] of the Rules, and, accordingly, importation of distant NBC, CBS, and ABC signals into those ten communities located within a smaller television market is inconsistent with Section 76.59 of the Commission's Rules.

6. We deal with the objections raised in paragraph 2 above as follows: (a) LVO's franchises for the subject communities were all granted prior to March 31, 1972, and, as such, need only substantially comply with the provisions of Section 76.31 of the Rules. *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973). LVO has submitted amendments showing that the franchises are in substantial compliance with Commission standards; (b) LVO's applications for certification were filed on April 24, 1972. By public notice dated June 22, 1972 (FCC memo 85945), the Commission stated that applications for certificates filed on or before May 9, 1972, need not be amended to include a statement in compliance with Section 76.13(a)(8); (c) each of the 14 communities constitutes a separate cable television system as defined by Section 76.5 (a) of the Rules.[6] Accordingly, each community's signal carriage

[4] Section 76.95(c) states: Any cable television system (as defined in Section 76.5(a)) having fewer than 500 subscribers need not comply with the provisions of Sections 76.91 and 76.93.

[5] Section 76.5(l) defines a full network station as: A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (i.e., right of first refusal or first call).

[6] Section 76.5(a) reads in pertinent part: NOTE: In general, each separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete, unincorporated areas) served by cable television facilities constitutes a separate cable television system, even if there is a single headend and identical ownership of facilites extending into several communities. See, e.g., *Telerama, Inc.*, 3 FCC 2d 585 (1966); *Mission Cable TV, Inc.*, 4 FCC 2d 236 (1966).

proposal will be judged against the applicable signal carriage provisions of the Rules, absent a showing of special need as contemplated in paragraph 112 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 186 (1972). KTVB has made no such showing to support its request; (d) although the Portland independent station is closer than the Denver independent station to Boise, Section 76.59 (b)(2) permits carriage of the Denver independent stations on those LVO systems located within the Nampa, Idaho, smaller television market. KTVB has made no showing to support any departure from this rule; (e) although the Commission is considering certain multiple ownership restrictions in Docket No. 18891, there is no current policy prohibiting a multiple system operator from operating the proposed systems; (f) in paragraph 39 of *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 341 (1972), we set forth our reasons for not extending syndicated program exclusivity to smaller television markets. No evidence has been presented herein to persuade us to depart from this conclusion; (g) the Commission's Rules contain no requirement for disclosure of LVO's plans for closed-circuit programming, if any. No evidence has been presented to justify a grant of this extraordinary relief. KTVB's Petition for Special Relief must also be denied. The arguments raised in connection with its request for extension of the Boise specified zone were considered and rejected in paragraphs 46 and 47 of the *Reconsideration*, *supra*. No new evidence has been presented by KTVB to persuade us to change the views we expressed therein. With regard to its request for waiver of Section 76.95(c) of the Rules, KTVB has made no showing of any substantial adverse economic impact which would occur as a result of program duplication by those Cable systems having fewer than 500 subscribers. *See Report and Order in Docket No. 18785*, FCC 74–299, 46 FCC 2d 94 (1974).

7. Although KBOI–TV, in its Petition for Special Relief, has provided some economic data in support of its request for extension of the Boise specified zone, we do not consider this showing sufficient to grant waiver of the Rule.[7] KBOI–TV's request for syndicated program exclusivity must also be denied for the reasons stated in paragraph 6 above.

8. The objections raised in paragraph 4 above deal with the signal carriage proposals of LVO. On April 24, 1972, when LVO filed its original application, Idaho Television Corporation was the holder of a construction permit for Television Broadcast Station KITC, Nampa, Idaho, which gave Nampa a specified zone for a period of 18 months after the initial grant of its construction permit, pursuant to Section 76.5(f) of the Rules.[8] The 18-month period expired on November 26, 1972. The signal carriage proposal contained in LVO's original application treated those six communities within the specified zone

[7] KBOI–TV argues that 49.9 percent of its viewing audience resides beyond the Boise 35-mile zone, and that unrestricted signal importation outside of this zone will endanger the ability of KBOI–TV to generate adequate revenue to meet its local program desires and obligations. For example, KBOI–TV estimates that a loss of 10,000 television sets to a cable system would result in a revenue loss of $90,000 per year. However, this argument fails to take into consideration the existence of the Nampa, Idaho, specified zone. (See discussion in paragraph 8, above.)

[8] Section 76.5(f) reads in pertinent part: A television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit.

of Boise, Idaho,[9] as within a smaller television market, and the other eight communities as outside all television markets. LVO's original signal carriage proposal treated KTVB and KBOI–TV as partial network stations and requested carriage of the three full network stations from Salt Lake City, pursuant to Section 76.59(b)(1) of the Rules. KIVI [10] became operational in February, 1974, thus creating a specified zone in the smaller television market of Nampa, Idaho. All of the subject communities are now located within the smaller television market of Nampa, Idaho, with the exception of Weiser and Payette, Idaho, and Vale and Ontario, Oregon which are located outside of all markets. On April 15, 1974, LVO filed a supplemental pleading[11] in which it argues that the Commission should treat LVO's signal carriage proposals in the context of the situation which existed from November 26, 1972, to February 6, 1974, during which time KITC was without a specified zone. To do otherwise, it is argued, would work an injustice on LVO for the Commission's delay in processing the applications. LVO claims that anything other than a full and complete grant of the applications would result in confiscation of the substantial investment that LVO has made in reliance on its franchise and would make it impossible for LVO to construct enonomically viable cable systems serving the referenced communities. In addition, LVO points to the number of contested applications for certificates of compliance which were filed subsequent to its filings and which have been acted upon by the Commission as justification for its request. KTVB, KBOI–TV, and KIVI have all filed responses to LVO's pleading in which they argue that the application should be handled in accordance with the facts as they exist at the present time.

9. We reject LVO's arguments for the following reasons: (a) At the time LVO filed its original application, KITC, Nampa, Idaho, was a construction permittee for a television broadcast station. As a construction permittee, KITC was entitled to be treated as having a specified zone until 18 months after the initial grant of the permit, pursuant to Section 76.5(f) of the Rules. As a result, at the time LVO filed its application, ten of the subject communities were within the smaller television market of Nampa, Idaho, which, for signal carriage purposes, had three full network stations required to be carried pursuant to Section 76.59(a) of the Rules. The proposal to carry three Salt Lake City network stations in these ten communities was clearly inconsistent with Section 76.59 of the Rules at that time; (b) Although KIVI's specified zone terminated on November 26, 1972, it does not automatically follow that those communities located outside the specified zone of Boise, Idaho, but within 35 miles of Nampa's reference point were outside of all markets for signal carriage purposes; [12] (c) KIVI's commencement of operations gives the smaller television market communities three full network stations. Importation of full network stations

[9] The communities within the specified zone of Boise, Idaho, include: Boise, Garden City, Meridian, Nampa, Caldwell, and Emmett, Idaho.

[10] The call letters of KITC have been changed to KIVI.

[11] Although it is not specifically labeled as such, we will treat this pleading as an amendment to the application.

[12] *See* paragraph 77 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 172 n. 39 (1972). *See also Houma Cablevision, Inc.*, FCC 74–567, —— FCC 2d —— (released June 6, 1974).

from Salt Lake into those communities is thus inconsistent with Section 76.59(b) of the Rules. We are not convinced that the administrative delay of which LVO complains amounts to a denial of due process. LVO's reliance upon *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926), in support of this contention is misplaced. In that case, the Supreme Court was concerned with the inactivity and delay of a state commission for two years after a state court had ordered it to conduct further proceedings in a rate schedule case. The Court's language dealing with deprivation of property and the denial of due process caused by the delay was aimed at a state body charged with the duty of regulating rates of a public utility and was intended as an illustration of the injury suffered by Illinois Bell which entitled it to apply to a federal court for equitable relief. Obviously, this is not the situation in the present case. LVO has made no showing to support its claimed economic injury. Furthermore, the fact that applications for certificates filed subsequent to LVO's have been processed by the Commission has no relevance to the issues in this case. As indicated above, LVO's signal carriage proposal was inconsistent with the Commission's Rules from the outset. LVO has not sought waiver of our signal carriage rules, nor has sufficient evidence been presented which convinces us to grant a waiver *sua sponte*.

10. The ten communities located within the smaller television market of Nampa, Idaho, will receive certificates to carry all of the requested signals with the exception of the three Salt Lake City network stations.[13] Those four communities located outside of all markets will receive certificates to carry those signals proposed in the original application.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications to the extent indicated in paragraph 10 above would be consistent with the public interest.[14]

Accordingly, IT IS ORDERED, That the "Objections of Idaho Television Corporation to Applications for Certification" and the "Comment on Supplement to Applications for Certification" filed by Idaho Television Corporation, permittee of Television Broadcast Station KIVI, Nampa, Idaho, on June 2, 1971, and May 9, 1974, respectively, ARE GRANTED to the extent indicated above and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That the "Objections to Applications for Certification and 76.7 Petition for Special Relief" and the "Opposition to Supplement to Applications for Certification" filed by KTVB, Inc., licensee of Television Broadcast Station KTVB, Boise, Idaho, on June 2, 1972, and May 9, 1974, respectively, ARE GRANTED to the extent indicated above and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That the "Consolidated Opposition to Applications for Certification and Petition for Special Relief and

[13] LVO has not requested certification for carriage of KIVI, Nampa, Idaho. Section 76.11(a) permits an existing system to add a local signal such as this without the filing of an application for certificate of compliance upon giving proper notice, where no objection is filed with the Commission within 30 days of such notice.

[14] Consistent with paragraph 6 above, the certificates of compliance will be granted until March 31, 1977, at which time LVO's franchises must strictly comply with the Commission's Rules.

109-004—74——12

the "Opposition to Supplement to Applications for Certification" filed by Boise Valley Broadcasters, Inc., licensee of Station KBOI–TV, Boise, Idaho, on June 2, 1972, and May 15, 1974, respectively, ARE GRANTED to the extent indicated above and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That the "Application[s] for Certification" filed by LVO Cable, Inc., on April 24, 1972 (CAC–221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233), ARE GRANTED to the extent indicated in paragraph 10 above and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-794

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MISSOURI VALLEY TV CO., INC., CHAMBERLAIN, S. DAK. For Certificate of Compliance	CAC-1089 SD006 SR-11705

MEMORANDUM OPINION AND ORDER

(Adopted July 17, 1974; Released July 25, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. Missouri Valley TV Company, Inc., operates a cable television system at Chamberlain, South Dakota, a community located within the smaller television market of Reliance, South Dakota.[1] The system now provides its subscribers with the following television signals:[2]

KSOO-TV (NBC, Channel 13) Sioux Falls, South Dakota
KORN-TV (ABC, Channel 5) Mitchell, South Dakota
KTSD-TV (Educ., Channel 10) Pierre, South Dakota
KPLO-TV (CBS, Channel 6) Reliance, South Dakota
WTCN-TV (Ind., Channel 11) Minneapolis-St. Paul, Minnesota

Missouri Valley requests certification to add the television signal of:

KOA-TV (NBC, Channel 4) Denver, Colorado

2. On November 12, 1970, Missouri Valley filed a petition for special relief, requesting a waiver of the Commission's interim procedures in Docket No. 18397 [proposed rule 74.1107(a)(2)] and for authorization to carry Stations KOA-TV (NBC), and KBTV (ABC), Denver, Colorado, on its cable television system at Chamberlain, South Dakota. Missouri Valley has subsequently withdrawn its request for carriage of KBTV and has requested that the Commission consider its above-mentioned petition as an application for certificate of compliance authorizing the carriage of KOA-TV. Mitchell Broadcasting Association, Inc., licensee of Station KORN-TV, Mitchell, South Dakota, filed an opposition to Missouri Valley's petition for special relief and Missouri Valley has replied.[3]

3. The provision concerning which Missouri Valley originally sought a waiver is now embodied in Section 76.59(b)(1) of the Com-

[1] Chamberlain has a population of 2,626, and Missouri Valley serves approximately 450 subscribers. The cable system commenced operations in October, 1955, and is currently employing all of its five-channel capacity for television signal carriage. Although not specifically stated by Missouri Valley, presumably it intends to delete the distant signal of KSOO-TV (NBC), Sioux Falls, and add that of KOA-TV (NBC), Denver, should the instant application be granted.

[2] CAC-715 was granted by the Chief, Cable Television Bureau, pursuant to delegated authority on September 18, 1972.

[3] KSOO-TV, Inc., licensee of Stations KSOO-TV and KCOO-TV, Sioux Falls, and Aberdeen, South Dakota, also filed an opposition to Missouri Valley's petition for special relief. This opposition has been dismissed at the request of KSOO-TV.

mission's Rules, which states that in order for a cable system to provide a full complement of network signals, where such signals are not locally available, a system may carry the nearest full network stations, or the nearest in-state full network stations. By proposing to carry KOA–TV, Denver, Missouri Valley has passed by (leapfrogged) some 20 NBC network affiliates which are nearer to Chamberlain, South Dakota, than is the Denver station.

4. In support of its request for special relief, Missouri Valley alleges the following: (a) A signal of acceptable quality cannot be received over the air from the two closest NBC affiliates, KSOO–TV, Sioux Falls, and its satellite, KCOO–TV, Aberdeen.[4] Those stations are 140 miles and 115 miles, respectively, from Chamberlain; (b) To obtain an adequate signal from either KSOO–TV or KCOO–TV would necessitate the reconstruction of its system or the purchase of a common carrier relay feed; [5] (c) The above-mentioned alternatives are economically unfeasible for a small system with only 450 subscribers; (d) The only practicable way to provide NBC programming of acceptable signal strength to its subscribers is to carry KOA–TV, Denver, which is brought to within 15 miles of Chamberlain by Mountain Microwave Corporation, which has a common carrier relay station at Medicine Butte, South Dakota; [6] and (e) No other NBC affiliate is relayed to any point within South Dakota.

5. In its opposition, Mitchell Broadcasting argues that Missouri Valley has not presented sufficient evidence in support of its contention that compliance with the Commission's network anti-leapfrog rule is economically unfeasible, and has not demonstrated good cause for a waiver of that rule.

6. In paragraph 92 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 179 (1972), and in paragraph 25 of the *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 335 (1972), the Commission stated that the policy behind the anti-leapfrog provision is to inhibit the selection of stations from only a few of the largest markets and to foster general participation by broadcast television stations in the benefits of cable carriage. However, in paragraph 113 of *Cable Television Report and Order*, *supra*, we further stated that "We will continue to be flexible as to the leapfrogging provisions for network signals—the rules specify that waiver may be granted for good cause, e.g., to bring in a signal of greater interest or from the same state or to avoid excessive microwave costs." We have since exercised such flexibility and granted waivers of the anti-leapfrog provision in special circumstances where departure from

[4] Missouri Valley is presently carrying KSOO–TV and has presented photographs showing the poor reception of that signal over its cable system. Missouri Valley alleges that the signal of KCOO–TV cannot be carried on its system because that signal is completely blocked out by the signal of KTSD–TV, which is broadcast on an adjacent channel from a transmitter six miles north of Reliance, South Dakota.

[5] Missouri Valley has filed an affidavit of T. H. Steen, Manager and President of Missouri Valley TV Company, in which Mr. Steen states that "there is no possibility of obtaining improvement in the present signal through relocation of its tower from the present site, and furthermore, the tower height cannot be raised due to the proximity of Chamberlain Municipal Airport." Additionally, Missouri Valley has submitted letters from American Microwave & Communications, Inc., and Western Tele-Communications, Inc., which state that the monthly cost of bringing the signal of KSOO–TV to Chamberlain via microwave would be $2,250 for American and $2,604 for Western.

[6] Mountain Microwave has offered to deliver the signal of KOA–TV to Chamberlain for a monthly fee of $450.

the strict letter of the rule did not subvert its underlying policy. *Cablevision of Augusta, Inc.*, FCC 73–1304, 44 FCC 2d 547 (1973), *Cable TV of Minot*, FCC 73–614, 42 FCC 2d 310 (1973).

7. In the instant proceeding, Missouri Valley has presented sufficient evidence to warrant a waiver of the Rules. In light of the small size of the Chamberlain system, and the expense which would be incurred should a strict application of our leapfrog rule be imposed, we are convinced that carriage of Station KOA–TV is the only economically feasible method of bringing NBC network programming to Missouri Valley's subscribers. This, together with the fact that KSOO–TV, Inc., licensee of the station for which the Rules prescribe carriage, has not objected to the proposed carriage of Station KOA–TV, indicates that the public interest would best be served by granting the proposed waiver.

In view of the foregoing, the Commission finds that a grant of the subject petition for special relief and application for certificate of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Petition for Special Relief" filed by Mitchell Broadcasting Association, Inc., licensee of Station KORN–TV, Mitchell, South Dakota, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" (SR–11705) and application for certificate of compliance (CAC–1089), filed by Missouri Valley TV Company, Inc., ARE GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-743

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MULTI-PIX, INC., D.B.A. KIMBALL CABLE TV, KIMBALL, NEBR.	CAC-740 (NE004)
COMMUNITY TELECOMMUNICATIONS, INC., D.B.A. SIDNEY CABLE TV, SIDNEY, NEBR.	CAC-741 (NE007)
MULTI-PIX INC., D.B.A. ALLIANCE CABLE TV, ALLIANCE, NEBR.	CAC-761 (NE001)
For Certificates of Compliance	CSR-217

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 17, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND HOOKS CONCURRING IN THE RESULT.

1. Community Telecommunications, Inc. has existing cable television systems at Kimball, Sidney and Alliance, Nebraska,[1] which are located outside all television broadcast markets, and which presently provide the following broadcast signals over each 12 channel system:[2]

KWGN-TV (Ind., Channel 2) Denver, Colorado
KRMA-TV (Educ., Channel 6) Denver, Colorado
KMGH-TV (CBS, Channel 7) Denver, Colorado
KBTV (ABC, Channel 9) Denver, Colorado
KOA-TV (NBC, Channel 4) Denver, Colorado
KTNE-TV (Educ., Channel 13) Alliance, Nebraska
KDUH-TV (NBC, ABC, Channel 4) Hay Springs, Nebraska
KSTF[3] (ABC, NBC, CBS, Channel 10) Scottsbluff, Nebraska

On June 28 and June 29, 1972, CTI filed applications for certificates of compliance to add the following television stations to each system's service complement:

KTLA (Ind., Channel 5) Los Angeles, California
KHJ-TV (Ind., Channel 9) Los Angeles, California
KTTV (Ind., Channel 11) Los Angeles, California
KCOP (Ind., Channel 13) Los Angeles, California

These same signals were noted for proposed carriage by the Alliance, Kimball and Sidney systems, pursuant to former Section 74.1105 of

[1] CTI purchased the Multi-Pix, Inc. systems at Kimball and Alliance in 1969, and the Multi-Pix name was used in filing the applications.

[2] These systems all commenced operations prior to 1957. Kimball has a population of 3800 and 906 subscribers; Sidney—population 7200, subscribers 2038; Alliance—population 6860; subscribers 1615.

[3] The CTI-Sidney system carries KTVS (CBS, Channel 3) Sterling, Colorado, instead of KSTF.

the Rules, on December 1, 1970. Objections were filed to the proposal;[4] but the entire matter was dismissed as moot on April 6, 1973. However, CTI's Alliance system seeks to justify its current proposal to import the four signals by virtue of the prior Section 74.1105 notifications, and the grandfather provisions of Section 76.65 of the new rules.[5] Our records show that the Alliance notification, filed December 8, 1970, drew timely objections, and that the Commission never authorized the signals for carriage. Thus the four signals cannot be considered grandfathered to the Alliance system. *See, Fort Smith TV Cable*, 39 FCC 2d 573 (1973); *Butte Television Co., Inc.*, 40 FCC 2d 670 (1973); *Teleprompter of Oregon*, 44 FCC 2d 402 (1973). The Kimball and Sidney systems allege that their proposals to carry the four Los Angeles signals are consistent with the rules. We find that carriage of these signals by all three systems is consistent with Section 76.57(b) of the rules.

2. On August 22, 1972, Duhamel Broadcasting Enterprises, licensee of KDUH–TV, filed oppositions[6] alleging that because KDUH–TV serves the sparsely populated, Western Nebraska panhandle, it is beset by problems typical of small market broadcasters. KDUH–TV maintains that 83% of its audience, and therefore considerable advertising revenues, are found in the area outside its 35 mile zone. It claims that cable television adversely affects its revenues and audience, and that wholesale distant signal importation by cable severely increases competition for limited audience, advertising revenues and programming sources. Cable, it is argued, has caused KDUH–TV to experience operating losses in 10 of the last 13 years, including a loss of $102,000 in 1971 alone. Duhamel asserts that CTI's systems in Kimball, Alliance and Sidney do not need the proposed signals to stimulate additional system growth; nor, it is claimed, will exclusivity protection reduce the potential detriment to KDUH–TV from the instant proposal. Duhamel requests close scrutiny of this case in light of the Commission's concern for the plight of Rocky Mountain broadcasters, faced with the economic incursions of cable.

3. In reply, CTI re-asserts that its proposal is fully consistent with Section 76.57(b). It asks the Commission to deny Duhamel's petitions for failure to sufficiently support its claims of adverse impact, and because the petitions are really requests for reconsideration of the 35 mile zone for small market broadcasters. In response, Duhamel denies that its petitions for special relief are requests for reconsideration and reiterates its allegation of adverse economic impact to KDUH–TV from the proposed signal importation.

4. We note that Duhamel and others have previously made, and we have previously rejected, arguments for extending the zone of

[4] Duhamel Broadcasting filed "Preliminary Comments and Opposition to Importation Proposal" in SR–17117 (Sidney), SR–17118 (Kimball), and SR–17120 (Alliance), invoking the automatic stay provisions of former Section 74.1105(c) of the rules.

[5] CTI states in CAC–761 (NE001) that its notice for the Alliance system was given on September 3, 1970, that no timely objections were filed, and so carriage of the four signals is grandfathered for the system. However, the same statement by CTI in a related case had to be retracted as inaccurate, *Community Telecommunications, Inc.* 41 FCC 2d 860 (1973).

[6] "Opposition and Petition for Special Relief Against Kimball Cable Co. and Sidney Cable Co."; and "Opposition and Petition for Special Relief Against Alliance Community TV Co." (CSR–217). In these oppositions, Duhamel has specifically incorporated by reference all its earlier pleadings (see note 4 *supra*).

protection for small market broadcasters.[7] We have stated that the conditions of such broadcasters do bear watching, but that we will not further restrict signal carriage, or extend the 35 mile zone, unless the proper showings have been made.[8] The "essential consideration" upon which the outcome of special relief requests, such as Duhamel's, must turn is not cable penetration or audience fragmentation. Rather, we will inquire whether the impact of "cable operations on station revenues and profits . . ." has affected a station's "ability to serve the public interest . . ."[9]. Duhamel alleges that the 10 year trend of operating losses for KDUH–TV is the result of cable operations in these communities, and claims that it will be further impaired by the proposed importation. However, Duhamel does not specifically show that the direct cause of these losses is attributable to the existing cable operations at Alliance, Sidney and Kimball, or that their proposed addition of signals is likely to cause economic hardship, loss of advertising revenues, or audience fragmentation.[10] Furthermore, we note that KDUH–TV began operations in February, 1958, more than one year after the cable systems commenced operations. We must, therefore, reject Duhamel's arguments.

In view of the foregoing, we find that a grant of the above-captioned applications is consistent with the public interest.

Accordingly, IT IS ORDERED, That the applications of Community Telecommunications, Inc. filed on June 28 and 29, 1972, (CAC–740, 741 and 761) ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the oppositions and petitions for special relief filed by Duhamel Broadcasting Enterprises, licensee of KDUH–TV, Hay Springs, Nebraska, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[7] See, para. 91 of the *Cable Television Report and Order*, 36 FCC 2d 178–79 (1972), and paras. 45–47 of the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 343–44 (1972).

[8] *Butte Television, supra; Ogallala Cable TV*, FCC 74–404, —— FCC 2d —— (1974).

[9] *Cable Television Report and Order, id*, para. 91.

[10] See generally, *Cable Television Report and Order*, paras. 112, 113, 36 FCC 2d 141, 186–87 (1972); *Gerity Broadcasting Co.* 36 FCC 2d 69 (1972); *Fort Smith TV Cable Co.*, 39 FCC 2d 573 (1973); *Community TCI of Missouri, Inc.*, 45 FCC 2d 133 (1974); *Greater New England Cablevision, Co.*, 45 FCC 2d 597 (1974).

FCC 74-774

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PEASE CABLE TV CO., PEASE AIR FORCE BASE, ROCKINGHAM COUNTY, N.H. For Certificate of Compliance	CAC-2490 (NH041)

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 24, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. Pease Cable TV Company has filed an application for a certificate of compliance to commence cable television service at Pease Air Force Base, located within the Manchester, New Hampshire, smaller television market. Pease Cable TV Company proposes carriage of the following television broadcast signals:

WMTW-TV (ABC, Channel 8) Poland Springs, Maine
WCSH-TV (NBC, Channel 6) Portland, Maine
WGAN-TV (CBS, Channel 13) Portland, Maine
WMUR-TV (ABC, Channel 9) Manchester, New Hampshire
WENH (Educ., Channel 11) Durham, New Hampshire
WSMW-TV (Ind., Channel 27) Worcester, Massachusetts
WBZ-TV (NBC, Channel 4) Boston, Massachusetts
WCVB-TV (ABC, Channel 5) Boston, Massachusetts
WNAC-TV (CBS, Channel 7) Boston, Massachusetts
WGBH-TV (Educ., Channel 2) Boston, Massachusetts
WSBK-TV (Ind., Channel 56) Cambridge, Massachusetts
WKBG-TV (Ind., Channel 38) Boston, Massachusetts

Pease's application is unopposed. The system's carriage proposal is consistent with Commission's Rules.

2. We note that Pease's franchise agreement was awarded pursuant to the procedures specified in Air Force Regulation 70-3. Therefore, it is inconsistent with Sections 76.31(a) (1) and (4) of our Rules, which require an appropriate public proceeding in the examination of franchise applicants' qualifications and before subscriber rate increases, respectively. In *Cable Antenna Systems*, FCC 744-646, —— FCC 2d —— (released June 26, 1974), we said at paragraph 7:

> [W]e find that because of the unusual nature of military operations, it is appropriate to waive the requirements of Section 76.31(a) (1) and (4) of our Rules. . . . We note that special considerations have led Congress to establish the armed forces procurement statute which avoids public proceedings in the award of contracts for services. (footnote omitted)

Similarly, we will waive Sections 76.31(a) (1) and (4) of the Rules in the instant case. The franchise is in other respects consistent with Section 76.31.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–2490) filed by Pease Cable TV Company IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-268

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
STEPHEN P. BELLINGER, JOEL W. TOWNSEND, BEN H. TOWNSEND, AND REYNOLD FISCHMAN, D.B.A. PRAIRIELAND BROADCASTERS, DECATUR, ILL.	Docket No. 20055 File No. BPH-8066
WBIZ, INC., DECATUR, ILL.	Docket No. 20056 File No. BPH-8267
SUPERIOR MEDIA, INC., DECATUR, ILL.	Docket No. 20057 File No. BPH-8351
DECATUR BROADCASTING, INC., DECATUR, ILL.	Docket No. 20058 File No. BPH-8390
L.E.G., INC., AND JOHN G. CHEEKS, D.B.A. SOY COMMUNICATIONS CO., A JOINT VENTURE, DECATUR, ILL.	Docket No. 20059 File No. BPH-8682
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 24, 1974; Released July 25, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Before the Review Board is a motion to limit application of issue, filed June 19, 1974, by WBIZ, Incorporated (WBIZ), requesting, in effect, deletion of a *Suburban* issue specified against it in the designation Order of the Chief of the Broadcast Bureau, acting pursuant to delegated authority, 39 FR 19804, published June 4, 1974.[1]

2. WBIZ's request for deletion is predicated on the submission of two affidavits attached to its motion. WBIZ argues that although the area of uncertainty questioned by the Chief of the Broadcast Bureau in designating the issue is sufficiently explained in its application, the newly submitted information in, any case, clearly resolves that uncertainty and demonstrates that the applicant has fully complied with the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). The Broadcast Bureau opposes deletion of the issue on the ground that designated issues are better resolved in evidentiary hearings than in pleadings.

3. The Board will deny WBIZ's motion. We have repeatedly held that, in the absence of a compelling showing of unusual circumstances, such as where the Commission failed to consider information before it, petitions to delete issues on the basis of material contained in pleadings or post-designation amendments will be denied. See *RKO Gen-*

[1] Also before the Review Board are the following related pleadings: (a) opposition, filed July 3, 1974, by the Broadcast Bureau; (b) supplement to motion to limit application of issue, filed July 8, 1974, by WBIZ; and (c) reply, filed July 11, 1974, by WBIZ.

eral, Inc. (*WOR–TV*, FCC 74R–265, —— FCC 2d ——, released July 23, 1974; *The United Telephone Co. of Pennsylvania, Inc.*, 42 FCC 2d 1003, 28 RR 2d 591 (1973), review denied FCC 73–1296, December 17, 1973; and *Trans America Broadcasting Corp.*, 20 FCC 2d 469, 17 RR 2d 860 (1969). In our view, the Chief of the Broadcast Bureau made a reasoned analysis of the facts as they appear in the application. Thus, while additional light may be shed on those facts by the newly furnished affidavits, the considerations of orderliness and expedition in the administrative process warrant that ambiguities and uncertainties found in applications and predesignation amendments be resolved through the hearing process and not through post-designation attempts to explain them in petitions to delete, particularly when a hearing must be held in any case. *Jimmie H. Howell*, 44 FCC 2d 804, 29 RR 2d 349 (1974); *Summit Broadcasting*, 18 FCC 2d 83, 16 RR 2d 434 (1969). In sum, although the affidavits may provide a means by which the applicant may meet the issue, they do not justify resolution of a factual question on the pleadings and deletion of the issue. *RKO General, Inc.* (*WOR–TV*), *supra; Orange Nine, Inc.*, 8 FCC 2d 637, 10 RR 2d 489 (1967).

4. Accordingly, IT IS ORDERED, That the motion to limit application of issue, filed June 19, 1974, by WBIZ, Incorporated, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-272

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
STEPHEN P. BELLINGER, JOEL W. TOWNSEND, BEN H. TOWNSEND, AND REYNOLD FISCHMANN, D.B.A. PRAIRIELAND BROADCASTERS, DECATUR, ILL.	Docket No. 20055 File No. BPH-8066
WBIZ, INC., DECATUR, ILL.	Docket No. 20056 File No. BPH-8267
SUPERIOR MEDIA, INC., DECATUR, ILL.	Docket No. 20057 File No. BPH-8351
DECATUR BROADCASTING, INC., DECATUR, ILL.	Docket No. 20058 File No. BPH-8390
L.E.G., INC., AND JOHN G. CHEEKS, D.B.A. SOY COMMUNICATIONS CO., A JOINT VENTURE, DECATUR, ILL.	Docket No. 20059 File No. BPH-8682
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 25, 1974; Released July 26, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. This proceeding involves the above-captioned mutually exclusive applications for authorization to construct a new FM broadcast station on Channel 236 in Decatur, Illinois. These applications were designated for consolidated hearing on various issues by Commission Order, 39 FR 19804, published June 4, 1974. Now before the Review Board is a motion to enlarge issues, filed June 19, 1974, by Prairieland Broadcasters (Prairieland), requesting the addition of a financial issue against Soy Communications Company, A Joint Venture (Soy).[1]

2. In support of its request for a financial issue, Prairieland first avers that Soy has a bank loan commitment which is to be collateralized, *inter alia*, by a guaranty of L.E.G., Inc. (L.E.G.), one of Soy's joint venturers. Prairieland then asserts that since Soy's application does not contain any such guaranty, or any indication of L.E.G.'s willingness to make such a guaranty, an issue should be added to the instant proceeding with respect to the availability of the bank loan in question. In opposition, Soy argues that L.E.G.'s guaranty of the loan is implicit in its application since the guaranty is a condition of the financing letter signed by the bank and submitted by Soy.[2] Additionally, Soy notes that although not required to do so, it is submitting the form of a guaranty to the bank, signed by Roger B. Pogue, vice-presi-

[1] The Board also has before it for consideration the following: (a) opposition, filed July 1, 1974, by Soy; and (b) opposition, filed July 3, 1974, by the Broadcast Bureau.

[2] The Broadcast Bureau also opposes the requested issue.

dent and one-third owner of L.E.G. A copy of the guaranty is attached to Soy's opposition.

3. The Board will deny the requested issue. After consideration of Soy's opposition, including the form of a guaranty which indicates L.E.G.'s willingness to guarantee the loan in question, the Board is satisfied that Soy has adequately resolved the question raised by petitioner. In this regard, we note that Prairieland has not filed a reply pleading.

4. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed June 19, 1974, by Prairieland Broadcasters, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–721

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re request by
PRESCOTT AREA ANTENNA TELEVISION INC.,
PRESCOTT, ARIZ.
For Authority To Originate Local Announcements on Television Translator Station

JULY 2, 1974.

PRESCOTT AREA ANTENNA TELEVISION, INC.,
c/o Mr. Bruce D. Fee, President,
967 W. Gurley Street, Post Office Box 1990
Prescott, Ariz.

GENTLEMEN: This refers to your letter received May 17, 1974, requesting authority to originate local announcements on television broadcast translator station KØ7AP, Prescott, Arizona, soliciting or acknowledging local public financial support.

The Commission, in 1968, carefully considered the matter of whether local originations on television translator stations, such as you propose, should be limited to UHF translators or extended to VHF translators as well. With a full record before it, the Commission, in its *Report and Order* in Docket No. 15971, determined that the great potential for interference precluded authorization of originations by VHF translators. The Commission is particularly concerned with the potential for interference in the Prescott, Arizona, area, given the history of your efforts to obtain authority to construct a channel 2 translator and to increase the power of existing translators. Moreover, you have not shown that all other feasible means to obtain financial support have been exhausted. Finally, the Commission is of the view that an undesirable precedent could be established by a grant of your request and if origination of VHF translators is to be permitted, it should be done through rulemaking proceedings.

For the reasons stated, your request is DENIED.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-800

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS FOR WAIVER OF THE PRIME TIME ACCESS RULE, § 73.658(k) OF THE COMMISSION'S RULES, BY AVCO BROADCASTING CORP. AND NEWHOUSE BROADCASTING CORP.

MEMORANDUM OPINION AND ORDER

(Adopted July 17, 1974; Released July 26, 1974)

BY THE COMMISSION: COMMISSIONER REID DISSENTING; COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission here considers requests for waiver of the "off-network" restrictions of the prime time access rule as adopted in 1970, § 73.658(k)(3) of the Commission's Rules, filed July 5, 1974 by Avco Broadcasting Corporation (Avco) and on July 9, 1974 by Newhouse Broadcasting Corporation (Newhouse). Basically, both requests are for permission for the top-50-market stations involved to carry a "stripped" off-network program during the first half-hour of prime time (7–7:30 E.T., 6–6:30 C.T.) Monday–Friday, starting this September. (The Avco request also includes another off-network program on Sunday at 7 on one of the three stations.) This would have been permissible under the modifications of the rule which the Commission adopted in January 1974 to be effective this September; but in a decision of June 18, 1974, the U.S. Court of Appeals (C.A. 2) enjoined the Commission from putting the changes into effect until September 1975, thus leaving the earlier rule in effect.[1] Four stations are involved here: the three Avco Ohio stations in Cincinnati, Columbus and Dayton (WLWT, WLWC and WLWD respectively) and the Newhouse station in St. Louis, KTVI.

2. In the January 1974 decision, the Commission removed all restrictions on Sundays and as to the first half-hour of prime time on weekdays, meaning that the programs involved here could be presented consistent with the rule if it were to become effective. Under the earlier, original rule—which, it appears, will remain in effect through the 1974–75 broadcast year—affiliated stations in the top-50-markets must keep one hour of prime time each evening "cleared" of network or off-network programs. Since these stations apparently intend to present the full three hours of network material each evening, they may not present the off-network programs without a waiver.

[1] *National Association of Independent Television Producers and Distributors (NAITPD), et al. v. FCC*, Case Nos. 74–1168, 74–1283 and 74–1348, decided June 18, 1974. Reconsideration of the Court's decision has been sought by appellants Warner Bros., et al.

3. Avco seeks waiver for its Ohio stations to present the following programs Monday–Friday from 7 to 7:30 E.T. (plus, for WLWD, *Lassie* at 7 on Sunday): WLWT, *Family Affair;* WLWC, *I Dream of Jeannie;* WLWD, *Beverly Hillbillies*). Avco states its belief that the Court erred in evaluating the equities involved, and that its decision does not preclude the grant of appropriate waivers on a case-by-case basis; and it believes that the waivers sought here are appropriate and should be granted. It is stated that when the Commission issued the *Report and Order* promulgating the changes in the prime time access rule, Avco purchased the off-network programs for which the waivers are sought, and the argument is made that it would be financially burdensome for each of the stations involved to shelve these programs.[2] It is further stated that these stations are at a competitive disadvantage now, since relying on the new rule, they did purchase programming which qualifies under the old rule, and there are few programs of quality to replace these programs with. As to WLWC, it is stated that the access period program that it has been using (*Beat the Clock*) has gone out of production. Avco argues that it made the contractual commitments in good faith and in reliance upon the amended rule, and would incur financial detriment as a result of the decision of the Court of Appeals; and that a grant of the requested waivers would assist Avco and would also allow the viewers in these three markets to receive a quality programming.

4. The Newhouse request, on behalf of its Station KTVI, St. Louis, is to permit the showing of the one-hour off-network program *Mod Squad* from 5:30 to 6:30 p.m. C.T. Monday–Friday. Newhouse states that Mod Squad was purchased in March 1974, in reliance on the changed rule, for $243,000, payable in 24 equal installments over the two years from September 1974 to September 1976, and, unless it is able to use the program at some time, it cannot afford the payments. It is claimed that moving the program back to 4:30 would mean $400 less revenue generated by the program per day, and there would be additional losses in revenue from moving its two-hour afternoon feature film back from 3 p.m. to 2:30 p.m. ($375 per day) and having to preempt an afternoon network program for the latter purpose ($100 per day). Assuming that it would also have to spend an average of $450 a day for first-run syndicated programs during the access period, it is claimed the losses, if waiver is not granted, will be more than $300,000 a year.[3]

5. In the alternative, KTVI asks that a waiver be granted so that it may present the *ABC Evening News* during prime time, in addition to three hours of other network programming. The station would broadcast the following schedule: *Mod Squad*, 5–6 p.m.; *To Tell the*

[2] Avco claims that the three stations purchased the programs involved for a total of more than $256,000. In the case of WLWD, it already has *Beverly Hillbillies*, which it has been running in the afternoon; it planned to move this into the 7–7:30 period and replace it earlier with *Family Affair*. The cost of the latter program ($69,000) is the figure included by Avco in its statement.

[3] The exact total of the losses mentioned above would be $354,600, assuming 5 days a week, 52 weeks a year. It is noted that the analysis does not include any revenue from the 6–6:30 period if filled with first-run syndicated programs.

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Truth, 6–6:30 p.m.; and *ABC Evening News*, 6:30–7 p.m. C.T.[4] KTVI says that this schedule would prevent the loss which it otherwise will face, and would also have the advantage of making network news available at 6:30 p.m. as well as at the 5:30 hour when the CBS and NBC news programs are presented in St. Louis, KTVI has been presenting its ABC news at 5:30 also, and apparently will continue to do so if neither of its waiver requests is granted; under the first request mentioned above, it would run it at 5 p.m.

DISCUSSIONS AND CONCLUSIONS

6. Upon careful consideration of these requests, we are of the view that they must be denied. We recognize that the presentation of all of this material would have been permissible under the changed rule if it were to become effective this September, and we assume, also, that the programs were bought in reliance on our decision to this effect. However, we have been enjoined by the U.S. Court of Appeals from making the rule changes effective for this coming broadcast year, and it does not appear appropriate to take actions looking toward the same result by way of waiver, which is what grant of these requests would amount to. It must be borne in mind that the waivers requested here go well beyond anything which has been granted in practice under the earlier rule,[5] and arise only from the change which was contemplated but now apparently will not come to pass this year. Thus, they are not part of the general concepts of waiver which have developed and which we propose to continue during the coming year in administering the original rule which remains in effect (see *CBS Inc.*, FCC 74–700, released July 9, 1974, par. 11). It is also to be noted that waiver in these cases might well be regarded as a precedent for numerous demands by other top-50-market stations to the same effect. At the least, we might well have to consider adjustment for other affiliated stations in the four markets involved here, which compete directly with these four stations. The result could be circumvention of the Court's holding on a large scale.

7. We note the arguments concerning equities, good-faith reliance on the Commission's January 1974 decision, and financial hardship; but we cannot consider them of decisional significance in light of the above considerations. These are, of course, private, rather than public, matters. Some other points should be noted in this connection. First,

[4] In "footnote 36" of the Report and Order adopting the rule in 1970 (23 FCC 2d 382, 395), it was stated that waiver for network news in the first half-hour of prime time would be granted if it were preceded by a full hour of local news or public affairs programming. Twenty to 25 stations have operated in this fashion under the rule, and this concept has been extended slightly in a few instances since. Under its proposed alternative schedule, KTVI would precede the ABC news with *To Tell the Truth* at 6, and follow it with network programming at 7.

[5] The basic request in all four cases is to present a "stripped" off-network program Monday–Friday during the first half-hour of prime time. The Commission considered requests to this effect on three occasions under the original rule, and denied all of them (two requests by stations for exemption from the rule, and another for advancement of the September 1974 relaxation, see 36 FCC 2d 681 (KSL–TV, August 1972); 37 FCC 2d 670 (WUHQ–TV, October 1972) and 45 FCC 2d 512 (WBRE–TV, February 1974)). The *Lassie* program (involved in one of Avco's requests) was denied waiver; see 35 FCC 2d 758. As noted in footnote 4, above, while waivers to permit presentation of network news during this period, it has always been (at least as to regular presentation) on the basis that the program would be preceded, or preceded and followed, by an hour of local news or public affairs material. KTVI does not propose this.

the fact that the Commission's decision had been appealed was well publicized, both in the trade press and in Commission pronouncements concerning the "stay" request and similar matters. Thus, parties were on reasonable notice that the Commission's action could not necessarily be regarded as final. Second, while there may be "financial hardship" in a sense, it does not appear to be of the magnitude which would seriously threaten these stations' economic welfare. Like most top-50-market stations, they are quite profitable operations. Moreover, these and other top-50-market stations may well benefit financially in other respects from the retention of the original rule as compared to the modifications which were to become effective this September, for example by being able to retain all of the revenues from the additional time on Sundays and Saturdays which the networks will not now program. Lastly, as to the financial analysis submitted by KTVI, it appears that the figures do not include the revenue which the station would gain from its presentation of first-run syndicated material during the 6–6:30 C.T. half-hour Monday–Friday, which might be considerable in amount.[6] In sum, we do not find in these private considerations reason to deviate from the general requirement which the Court has imposed for this coming year: that the previous regulation, barring network and off-network material from one hour of prime time on top-50-market affiliated stations, remain in effect.

8. In view of the foregoing, IT IS ORDERED That the requests for waiver of the "off-network" provisions of the prime time access rule as adopted in 1970 (§ 73.658(k)(3) of the Commission's Rules), filed by Avco Broadcasting Corporation and Newhouse Broadcasting Corporation on July 3 and July 9, 1974, respectively, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[6] KTVI has been presenting the *Truth or Consequences* program Monday–Friday from 6 to 6:30 p.m. C.T. According to Standard Rate and Data *Spot Television* (June 15, 1974), its rate for a 20–30 second spot announcement in this program ranges from $80 to $210, depending on the type of sale as to preemptibility. If it sold six such announcements per half-hour at an average rate of $100 each, it would have a daily revenue (deducting 15% agency commission) of $510, or $127,500 for 250 days a year.

FCC–74–700

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE PRIME TIME ACCESS RULE, § 73.658(k) OF THE COMMISSION'S RULES, BY CBS, INC. FOR THREE NFL PRESEASON FOOTBALL GAMES AND FOR THE DELAYED BROADCAST OF THE MISS UNIVERSE CONTEST

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1974; Released July 9, 1974)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT; COMMISSIONER REID CONCURRING IN PART AND DISSENTING IN PART.

1. The Commission here considers requests for waiver of the prime time access rule, § 73.658(k) of the Commission's Rules, as currently in effect, filed May 16 and May 21, 1974 by CBS Inc. (CBS), to permit the presentation during prime time of three NFL pre-season football games and a possible delayed broadcast of the *Miss Universe* contest, plus other network material the same evenings.[1]

2. Two of the football games will be presented on Sundays, August 25 and September 8, 1974, beginning at 9:30 p.m. E.T., and CBS requests a waiver for top-50 market owned and affiliated stations located in the Eastern, Central and Mountain time zones to present the games in addition to two hours of regular Sunday evening programming (7:30–9:30 E.T.) which would result in three and one-half hours network prime time programming in these time zones. A waiver is also requested to permit top-50 market owned and affiliated stations in the Pacific time zone to present the two games plus one hour of network programming on each date, which will result in three and one-half hours of prime time programming on each of the dates in question.

3. CBS also intends to present an NFL pre-season game on Friday, August 30, 1974, at 9:00 p.m. E.T., plus one additional hour of network prime time programming, and a waiver is needed to permit CBS affiliates in those top-50 markets in the Mountain time zone to present up to four hours of network prime time programming on this date (regular network programs from 6 to 7 p.m. M.T. and the game from 7 to 10 p.m. M.T.). A runover waiver is also requested for top-50 market owned and affiliated stations in the Pacific time zone to allow com-

[1] On June 18, 1974, the U.S. Court of Appeals for the Second Circuit in effect stayed until September 1975 modifications of the prime time access rule which were scheduled to become effective this September, pursuant to our decision of January 23, 1974, in Docket 19622 (44 FCC 2d 1081). While reconsideration of this "stay" decision may be sought, for the time being it is assumed that the "old" rule will remain in effect for 1974–75.

plete coverage of this Friday night pre-season game should it run beyond the scheduled three hours, plus the additional hour of network programming.

4. CBS also asks for a waiver to permit the presentation of the *Miss Universe* contest on Sunday evening, July 21, 1974, in addition to three hours of network prime time programming. The *Miss Universe* contest is scheduled to be carried live on the CBS Television Network on Saturday, July 20, from 10:00 p.m. to midnight E.T., and on a tape-delayed basis by stations in the Pacific time zone, from 10:00 p.m. to midnight P.T. Because the broadcast will originate from Manila, and because of possible transmission difficulties or because of possible preemption of this program by a special news or public affairs program, CBS asks for a waiver to allow the *Miss Universe* contest to be shown on a tape-delayed basis on the following evening, should this become necessary, at 10:30 p.m. to 12:30 a.m. E.T. and P.T.; 9:30–11:30 p.m. C.T., and 8:30–10:30 p.m. M.T. CBS asks permission to carry this delayed program as well as the regular three hours of network prime time programming in all time zones.

5. CBS urges that the public interest would be served by granting the requested waivers, since this would facilitate the presentation of highly popular NFL pre-season games, as well as the *Miss Universe* contest, which is claimed to be a major international event of considerable news interest as well as being a very popular program with the American viewing public. In addition, the Filipino government has expended a great deal of money and effort to make this evening successful, and CBS wishes to insure that the maximum possible viewing audience is available in the United States to see the program, and thus wants to present it during prime time, when broadcast live on Saturday, or, in the event of transmission difficulty or preemption, as soon thereafter as possible, which would be the following evening. CBS points out that all of these programming arrangements would be consistent with the "new" prime time access rule, which in the case of CBS, would have become effective on September 9, 1974,[2] and that the football games are all within one month of this date, and the *Miss Universe* pageant within less than two months. CBS argues further that all of these requests amount to only one additional hour, at most, in all four situations for which these requests are made, and that this constitutes only minimal impact upon the rule and its objectives. Finally, CBS maintains that the Commission has previously granted waiver requests where a network will provide more than the permissible three hours of programming to its affiliates during prime time and these decisions justify grants for the requests made here.[3]

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[2] The rule modifications adopted in January were to go into effect, for each network's affiliates, with the date in September which the network designated as the start of the fall season, which for CBS will be September 9. See footnote 1, above, as to the effect of the recent Court decision staying the modifications.

[3] The decisions cited by CBS are: 38 FCC 2d 1096 (1972), which permitted the presentation of up to four hours of network prime time programming by NBC-owned and affiliated stations of the New Year's Day Rose Bowl and Orange Bowl college football games; 30 FCC 2d 577 (1971), which granted the same waiver in the preceding year, as well as waiver to permit the carriage of the Super Bowl professional football championship game followed by the Bing Crosby Pro-Am golf tournament, which resulted in more than three hours of network prime time programming; and 33 FCC 2d 741 (1972), which granted a request of NBC to present two NFL play-off games, resulting in 3½ hours of network prime time programming in the Eastern and Central time zones.

DISCUSSION AND CONCLUSIONS

6. Upon consideration of the foregoing, we are of the view that the two football game requests first mentioned above (par. 2) must be denied; but that waiver should be granted in the case of the third football request and the *Miss Universe* situation (pars. 3 and 4 above).

7. In connection with the first two football requests, it must be borne in mind that: (1) waiver is requested to present 3½ or 4 hours of prime-time programming in *all of the four time zones*, and thus this is not a case of waiver taking into account time-zone differences in the relatively few Western markets to accommodate a schedule which complies with the rule in the more numerous Eastern and Central time zone markets; and (2) this is not post-season sports activity of wide national interest, as was the case in the decisions cited by CBS (footnote 3, above), nor a "runover" situation where waiver is sought on a contingent basis; but rather it represents a planned nationwide expansion of regular network programs beyond 3 hours, similar to any other expansion of network entertainment programming. We have not granted such waivers in the past and do not believe it appropriate to do so here.

8. CBS argues further that we should grant these requests because they are so close to the new rule (one day in the case of the game scheduled for September 8), and that all of these proposed events and network programming could be presented under that new rule. This point has, however, been rendered moot by the decision of the Second Circuit Court of Appeals.[4] Moreover, waiver is not necessary to facilitate the presentation of highly popular pre-season football games, as CBS asserts, but rather we would be facilitating the presentation of two additional hours of regular network programming in addition to the games. CBS has control over its schedule, and it has the ability to schedule these games in a time which does not conflict with the rule, and, likewise, the power to preempt any of its regular weekly programming to present the games. Our decision does not prevent the showing of these two games; rather, it places the burden on the network to find a place for the games in its schedules which is in accordance with the present rule.

9. As is stated above, we do grant the CBS request for sports runover waiver or the NFL pre-season game to be played on August 30, 1974, beginning at 9:00 p.m. E.T., and we grant the waiver to affected stations in the Mountain time zone to permit carriage of up to four hours of network prime time programming on this date. The Commission has previously granted an identical request by CBS for pre-season NFL games in 1973, and a grant is appropriate under our current interim waiver policy.[5] We note further that had the requests for the other two games followed the same pattern, they too would have been granted. Our decision here does not preclude CBS from making such a request, which can be handled by staff action.

10. With respect to the *Miss Universe* waiver, as mentioned above, this is requested only in case transmission difficulties prevent the pres-

[4] See footnote 1, *supra*.
[5] 42 FCC 2d 617 (1973).

entation of the program late the previous evening (Saturday, July 20), or if the time that evening should be preempted for a news or public affairs program. Insofar as transmission difficulties might occasion the need for Sunday time, or a Saturday preemption of the scheduled pageant time is indicated by the need to cover a fast-breaking, unexpected or extraordinary news event, this falls into the category of "contingent" situations such as sports runovers, and, therefore, waiver appears appropriate, particularly since only an additional half-hour is involved. While doubtless CBS could, if necessary, rearrange its Sunday schedule to accommodate this broadcast should the Saturday presentation not be possible, such rearrangement on short notice is not desirable. Therefore, waiver is granted to cover such eventualities. However, we also point out that as far as the possibility of preemption is involved, the waiver is only granted in case the Saturday time is preempted for a truly unexpected and extraordinary event and not simply for a documentary programs.

11. *Interim policy concerning waivers of the rule.* As mentioned in footnote 1, above, the U.S. Court of Appeals (C.A. 2) has recently stayed for a year the effectiveness of the modifications of the rule which were to become effective in September 1974. While there is the possibility that review and reconsideration will be sought of this decision, which might result in its modification, it must be assumed for the time being that the "old" rule will remain in effect until September 1975. Therefore, it is appropriate to indicate what the Commission's policy will be with respect to waivers of the prime-time access rule, for the coming broadcast year. A more detailed statement in this respect will be issued in the very near future. It appears that, in general, the appropriate approach is that which we adopted in the January decision with respect to the period before September 1974, generally continuing the policies with respect to waivers which have prevailed since 1971.[6] One possible exception to this may be the matter of blanket waivers for particular "off-network" programs—*Wild Kingdom*, etc.—as to which somewhat more orderly procedures may be adopted than those which have existed up to now. This will be covered in the statement mentioned.

ORDER

12. Accordingly, IT IS ORDERED, That the requests filed on May 16, 1974 by CBS Inc., for waiver of the prime time access rule, § 73.658(k) of the Commission's Rules, to permit the presentation of two NFL pre-season football games in addition to two hours of other network programming on Sunday, August 25 and Sunday, September 8, 1974, ARE DENIED; and the request of the same date for waiver to permit top-50 market owned and affiliated stations in the Mountain and Pacific time zones to present complete coverage of the NFL pre-season game to be played on August 30, 1974, beginning at 9:00 p.m. E.T., in addition to one other hour of network programming, IS GRANTED.

13. IT IS FURTHER ORDERED, That the request by CBS Inc. filed May 21, 1974, for waiver of the prime time access rule, to permit

[6] See *Report and Order* in Docket 19622, 44 FCC 2d 1081, 1147–48 (1974).

the possible delayed broadcast of the Miss Universe contest on Sunday, July 21, 1974, beginning at 10:30 p.m. E.T. and P.T., 9:30 p.m. C.T., and 8:30 p.m. M.T., in addition to three hours of regular network programming IS GRANTED; PROVIDED, That such broadcast is made necessary only by transmission difficulties with the live broadcast on the preceding day, or the program, scheduled to be presented beginning at 10:00 p.m. E.T., and carried live in all time zones (except the Pacific time zone) on Saturday, July 20, 1974, is preempted by a network news or public affairs program dealing with a fast-breaking or otherwise extraordinary and unforeseen event.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–798

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION FOR RULEMAKING TO REQUIRE BROADCAST LICENSEES TO MAINTAIN CERTAIN PROGRAM RECORDS	Docket No. 19667 RM–1475

SECOND REPORT AND ORDER

(Adopted July 17, 1974; Released July 26, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has before it the Further Notice of Proposed Rulemaking (44 FCC 2d 1176) considering whether to amend its rules to permit the reproduction of records and materials maintained locally for public inspection by television station applicants, permittees and licensees.

2. On January 3, 1974, we adopted a First Report and Order in this proceeding (44 FCC 2d 845) amending our rules to provide for public inspection of television station program logs and to establish the procedures which would apply to inspection requests. Among other things, the rules which we adopted permitted the inspecting party to obtain machine copies of these logs if they were willing to assume the costs of reproduction. As a result, an anomalous situation now exists in which copies may be had of newly available public material (the program logs) but not of the material which has traditionally been available pursuant to the provisions of Section 1.526 of the rules. While some television station may already permit copying of the material in its public file, none is now obliged to do so.

3. Accordingly, we invited comments on a proposed change in our rules to provide that all material in a television station's public file may be machine reproduced, with the costs of such reproduction to be borne by the inspecting party. Our tentative view was that a simple requirement to this effect might well suffice, but we indicated we would consider comments which suggested the need for more particularization as to the circumstances, conditions or procedures which should apply.

4. Only five parties filed comments in response to our Further Notice.[1] None of them recommended that we abandon our intention to amend the rules to permit machine reproduction of television station public file materials. CBS and NAB, however, believed that certain procedural safeguards should be included in our new rule. As a result,

[1] The parties filing comments include National Black Media Coalition ("Black Media"); Columbia Broadcasting System, Inc. ("CBS"); National Association of Broadcasters ("NAB"); National Citizens Committee for Broadcasting ("NCCB"); and Office of Communication of the United Church of Christ ("United Church").

the only dispute in the pleadings is the wisdom of adopting the specific safeguards suggested by CBS and NBC. As to the need for the rule itself, the situation is clear. For station and public alike, the lengthy period required to study and hand copy material while at the station can only be an inconvenience. So long as no unfair burden is imposed, an arrangement for the making of machine copies of these publicly available materials serves the interests of both parties. Moreover, it can simplify and hopefully facilitate the dialogue we wish to foster. Accordingly, we believe the proposed rule would serve the public interest provided appropriate procedures can be established to insure that the rule would work as intended. It is to these requirements that we now turn.

5. CBS believes machine reproduction of television station public file materials should be subject to procedural requirements similar to those applicable to the inspection and reproduction of television station program logs. According to CBS, permitting machine duplication of material in television station public files will represent an additional significant burden for television station licensees because these files consist of large and unwieldy masses of documents. CBS says requests for all or a large part of these files will require that many of the documents be removed from their normal location to another place (either in or outside of the station) for machine copying. Moreover, when a request is made for machine reproduction of only certain documents or certain pages in the files, a considerable task is said to be presented in removing and re-filing, particularly in cases where pages may have been bound.

6. CBS notes that when the Commission imposed procedural requirements for inspection and reproduction of station program logs, it specifically referred to the possibility of inspections being misused for harassment or being generated by private "competitive" considerations rather than public ones. CBS suggests the same possibilities of misuse would exist with respect to a new provision for machine reproduction of materials in the public files. CBS cites as an example of a machine duplication request being generated by competitive consideration rather than public ones, an attempt by one station to obtain machine copies of the license renewal application of another station in order to incorporate verbatim portions, such as the description of the city of license, in the requesting station's own renewal application.

7. When CBS suggests the use of procedural requirements similar to those applicable to inspection and reproduction of television station program logs, we assume it desires parties wishing machine copies of materials in the public file to make a prior appointment with the licensee and, at the time to identify themselves by name and address; to identify the organization they represent, if any, and to state the general purpose of the examination.

8. Currently, parties wishing to examine information in the public files need only identify themselves by name and address. We have specifically rejected previous requests to require all parties using the local public inspection file to give information concerning their organization membership (if any) and to state the general purpose of the examination. While we did require for the reasons cited in the First Report and Order in this proceeding, that additional informa-

tion be given by parties wishing to inspect the program logs (which were not generally publicly available) we do not think our existing requirements regarding identification of persons wishing to see materials already in the public inspection file need be expanded. The analogy to the situation with respect to availability of station program logs suggested by CBS is not applicable to this rulemaking, since the material in question (in CBS's example, the license renewal application) is already available to anyone wishing to see it and the only question at issue is whether to permit it to be machine copied instead of just being hand copied.

9. CBS and NAB express concern regarding possible complaints resulting from the temporary unavailability of public file materials which are being machine copied. CBS indicates that if a complete public file must be available for inspection during business hours, requests for large numbers of machine copies, or a large part of the file will require copying to be done on nights and weekends, thus creating additional problems. CBS indicates these problems could be alleviated if the Commission made it clear that removal of materials from the public file for a reasonable period of time in order to fulfill requests for machine copies of those materials would not constitute a violation of Commission rules regarding public availability.

10. NAB says the Commission should make it clear in adopting the new rule that stations are not required to maintain a duplicate public file to serve as a "back up" when requested material is being duplicated. NAB argues that the Commission has never indicated any concern that documents in the public file can only be inspected by one person at a time to the exclusion of all others. Thus, it should not be concerned material being machine duplicated will be temporarily unavailable to others wishing to see the material. According to NAB, any inconvenience to the public will generally be minimal, since "in house" copying will take only a few minutes and copying done outside of the station will generally mean the material will be unavailable for only a day or two. To require a duplicate public file would, it asserts, result in substantial costs to licensees, since extensive materials, including ascertainment support materials, and many letters from the public are involved.

11. NCCB claims NAB's argument is without practical basis as comments made by licensees in earlier filings in this proceeding (opposing public inspection of program logs) indicated that most television stations already maintained duplicate public files, NCCB notes that in these filings licensees sometimes attempted to distinguish program logs from public file materials on the basis that most public file records are duplicates. Moreover, says NCCB, permitting machine duplication of materials in the public file will not actually require licensees to maintain a duplicate public file. On the other hand, to include a provision in the new rule specifying that the public file may be unavailable for inspection whenever it is needed for duplication, and then to also include in the new rule NAB's requested provision allowing stations one week to make copies, would permit a station to forestall public access by withholding its public file from inspection by one citizen group for weeks at a time under the pretense of duplicating the file for another person or group.

12. In the past, we have not found it necessary or desirable to specify either that licensees must have, should have, or need not have a duplicate public file. Lacking specific evidence that our policy of not referring in our rules to the presence or absence of a duplicate public file is no longer advisable, we will continue to let licensees decide in good faith whether a duplicate public file is necessary. We have no reason to believe licensees will withhold information in the public file by the devices suggested by NCCB. If, however, future experience suggests otherwise, we can always revisit the question of including in our rules a discussion of duplicate public files and related problems of unavailability of certain materials in the public files due to requests for machine reproduction.

13. NAB believes that in order to avoid severe disruption of stations' normal activities, licensees should be given at least one week to comply with requests for machine copies. Their expectation is that single, specific requests could and would be satisfied on day-to-day basis, so that, in the majority of cases, licensees and inspecting parties would be able to establish a schedule suitable to both of their needs. Nevertheless, occasional requests for machine copies of a substantial number of documents, as, for example, ascertainment support materials, will sometimes be received, especially in the period immediately preceding the filing of renewal applications. In such instances, says NAB, a preestablished guideline from the Commission is needed to insure that the licensee's good faith efforts to comply with the rule are not called into question simply because its copying equipment or personnel cannot be immediately diverted from their normal station functions. NAB argues that seven days would not constitute an unreasonable delay in obtaining any material requested and would permit licensees to work requests into the normal ebb and flow of station activities.

14. NCCB contends that while it is difficult to see how requests for machine copies of materials could severely disrupt station operations, it is easy to see that a one week waiting period could constitute an unreasonable, obstructive delay, especially during the period immediately preceding the filing of a renewal application. According to NCCB, to specifically allow a station to wait one week before providing machine copies of materials would have exactly the same practical effect as requiring the public to make an appointment one week in advance to see the materials, an idea the Commission specifically rejected with respect to examination of television station program logs (FCC 74–214, March 4, 1974—Denial of Petition for Reconsideration filed by Capital Broadcasting Company). United Church says licensees should make copies available promptly since time is often a vital commodity in Commission proceedings and in carrying forward informed negotiations.

15. We agree with NAB's contention that while, in most cases, licensees and inspecting parties will be able to establish a mutually satisfactory arrangement regarding the schedule for providing machine copies of public file material, on occasions an individual request might require several days or more to fulfill. We also can agree with NCCB that in certain instances a one week waiting period could constitute an unreasonable delay. Thus, by indicating in the new rule that requests should be fulfilled "within a reasonable period of time, which in no

event shall be longer than seven days", we have attempted to suggest one week for copying is not necessarily unreasonable, but should not be assumed as the norm. If experience suggests a revision of our approach to dealing with the matter of time required to produce machine copies is necessary, we will re-examine this question.

16. NAB thinks the Commission should clearly indicate in its rule that the cost of machine duplication of public file material includes indirect costs, which supplement the direct per copy costs of utilizing copying equipment. Such indirect costs might include costs of providing personnel to operate the copying equipment, or to collate the requested material, or to perform other tasks necessary to providing the material to the inspecting party. Indirect costs might also, says NAB, include the costs of having station personnel accompany the public file material wherever it might be taken for copying.

17. NAB maintains that numerous smaller requests, or individual larger requests for material could result in significant and costly diversion of station personnel from their normal tasks. NAB believes that when a party uses outside copying services, personnel costs undoubtedly should constitute an element of the price charged for copying and that costs for in-house duplication should be computed in the same manner. NAB claims that personnel costs could be determined easily on a per hour or per copy basis. The Commission, therefore, it argues should reiterate as its policy that, while machine duplication should not be a profit making venture, stations should not have to absorb the costs of copying, including personnel costs.

18. United Church believes if the licensee chooses to make machine copies "in-hours", it should charge only its actual out-of-pocket costs, as, for example, paper and machine fees. If the machine reproductions is done by an independent copying service, the person seeking copies should only pay the usual commercial rates.

19. NCCB contends that if the new rule specifies that the cost of machine reproduction includes personnel costs, it would create an impression of high costs and would, thereby, discourage public requests for machine copies. NCCB indicates one could argue that an explicit provision regarding personnel costs is not necessary because a station could already include personnel costs as part of the "reasonable" costs of in-house duplication. In fact, says NCCB, even without mentioning personnel costs in the new rule, the personnel costs which will probably be charged by a station would generally be unreasonable since the station has the alternative of asking members of the public to make copies themselves instead of utilizing station personnel.

20. NCCB characterizes as familiar, though unfounded, NAB's contention that hordes of people are going to descend on stations and make requests for machine copies of materials in the public files. NCCB says the reason NAB provides no statistics in its pleading regarding present or anticipated use of the public files is because stations have never been inundated with persons wishing to inspect the public files in the past, and there is no reason to believe machine copying availability will unreasonably change this situation. While a few more interested persons or groups may visit the station, this modest increase

is precisely what the new rules are intended to encourage: that is, increased dialogue with local licensees.

21. Finally, NCCB maintains that personnel costs that may result from a station's having to machine reproduce a copy of a renewal application is far less than the costs which would result from an employee's sitting in the public file room while a member of the public reads and copies the application by hand. NCCB notes that while many licensees presently feel they must commit this personnel time to oversee public file use at the station, users of the public file are not asked to pay any personnel costs.

22. In that portion of amended Section 73.674 of our rules which provides for machine duplication of television station program logs, we merely indicate that the inspecting party "shall pay the reasonable cost of reproduction". During the more than four months that this new provision has been in effect we have had no indication that the term "reasonable cost" requires further clarification. Given this fact, we question the wisdom of referring to personnel costs in the rule, particularly with the danger cited by NCCB that such a reference might discourage public requests, and with the possibility that some stations may choose not to include personnel costs in computing the "reasonable costs" of in-house reproduction. Moreover, we assume that, in the absence of evidence to the contrary, licensees and requesting parties can agree upon "reasonable costs" of machine reproduction just as they seem to have been able to agree upon "reasonable cost" with respect to machine duplication of station program logs.

23. CBS argues that any rule providing for machine reproduction of materials in television station public files should specifically exempt viewer correspondence maintained pursuant to Section 73.1202(f) and 1.526(a)(7) of our rules. CBS states that, unlike other materials in the public file which are prepared by station licensee, such comments are sent by members of the public, either without knowledge that their correspondence is being placed in a public file in the first place, or with the understanding that their letters would be available only for public inspection, not for machine duplication and possible circulation. In either case, claims CBS, it would be inappropriate to permit machine reproduction of such letters. Moreover, such correspondence does not require the extensive study that might be necessary for licensee prepared public file documents, as, for example, a license renewal application. CBS notes the Commission has stated the objective of placing such letters in the public file is to merely "permit members of the public to better determine the nature of community feedback".

24. NAB suggests that the Commission consider fully and carefully the propriety of permitting the letters sent by members of the public to be machine copied. NAB thinks that, at the very least, the public deserves to know that their letters will not only be made public, but also may be duplicated and perhaps circulated to parties other than the licensee. NAB asserts that the fact that persons responding to the fifteen-day announcements required by Section 73.1202 have failed to request confidential treatment of their letters does not necessarily imply they wish to have their letters copied and distributed throughout the local community.

25. NCCB says there is no legitimate reason to prohibit machine duplication of letters that are already open to public inspection and available for copying by hand. NAB argues that such letters are often relied on by members of the public to bolster charges of inadequate service by the licensee or violation of the Commission's rules, and should not be treated differently than other public file material.

26. NCCB notes that the fifteenth day announcements required by Section 73.1202 encouraging the submission of letters indicates that letters received will, unless otherwise requested, become available for public inspection. NCCB submits that if the Commission believes members of the public should also be specifically informed that the letters will also be available for machine duplication, the fifteenth day announcement could be amended to indicate that letters will be available "for inspection and copying".

27. We agree with NCCB's contention that there is no reason to prohibit machine reproduction of letters from members of the public that are already available for public inspection and for copying by hand. Thus, we will not adopt the CBS suggestion that the new rule specifically exempt machine duplication of such letters. Nor do we think there is at this time, any reason to amend the fifteen-day announcement requirements of Section 73.1202 to indicate that unless otherwise requested letters will be available "for public inspection and copying". To amend the fifteen-day announcements in that fashion might suggest to the listener that his or her letter will automatically be reproduced in some manner. Such a suggestion might result in some listener who would submit a letter in response to the present fifteen-day announcements to refrain from sending a letter merely because of confusion as to how and why letters are automatically being reproduced.

28. Until such time as there is evidence that the difference between making the letters available for machine and hand copying, rather than merely hand copying, causes problems which were not foreseen when we adopted Section 73.1202, amending the announcement and risking the danger outlined above does not seem to be warranted. The potential for harassment cited by CBS, and the possibility that persons who are willing to have their letters made public may not be willing to have their letters distributed throughout the community were considered when we adopted the letter retention requirement and the fifteenth day announcement. This is why, of course, that the announcement specifies that the author of a letter has the option of having the letter made available for public inspection, or having it remain confidential.

29. In supplementary comments, NAB discusses the matter of mail requests for copies of logs or public file materials. NAB maintains the Commission should not require television station licensees to respond to such requests because such a requirement would be impractical, unnecessary and burdensome. Moreover, says NAB, such a requirement would not serve the Commission's stated purpose of proposing its new rules which was to benefit those members of the public who might otherwise spend hours at the station going through the laborious efforts of taking notes. NAB argues that this proceeding intended to facilitate use of public file materials by those members of the public who reside within the station's service area, who are legitimately concerned with

the station's programming and operations, and who would normally visit the station to inspect the program logs or the public file. The Commission did not envision, says NAB, a station sending copies of public file material to members of the public who reside outside the station's service area, who cannot receive a station's programming, and who could have very little, if any, interest in the station's programming and operations other than a statistical interest. NAB thinks private citizens and government agencies wishing to conduct research requiring access to information available in the public file of broadcast stations should avail themselves of the Commission's public file facilities. NAB suggests that as the central repository for public file materials of all stations, the Commission's Public Reference Room facilities are the logical source of information for those who engage in wide ranging surveys and research.

30. NAB also cites several practical problems which it believes would result from requiring licensees to comply with mail requests. Vague and ambiguous requests from thousands of miles away could be clarified only by continuing correspondence between the station and those seeking the material. Letters and responses could be lost in the mail, perhaps generating complaints to the Commission. Since costs of reproduction could not be determined in advance, stations would have to bill the requesting party (a process which would result in additional cost to the licensee) or send the materials C.O.D. NAB claims it is not difficult to imagine a proliferation of blanket requests to stations all over the country for logs or public file materials from students, researchers and various public and private agencies and institutions.

31. We agree with NAB that in this proceeding our intention is to facilitate use of a television station's local public inspection file by members of the public who reside within the station's service areas and who are directly affected by the station's efforts to meet local problems and needs. Moreover, as NAB suggests, the Commission's public documents room in Washington is available to those persons who, because of distance, do not wish to visit the station or stations in question, but are interested in the station's performance. Thus, while we certainly would not discourage licensees from complying with mail request for machine copies of information in their public files, we do not think it appropriate to require such compliance.

32. Black Media believes that material in the public file of radio stations should also be available for machine reproduction. Black Media points out that with the adoption of the new rule, a member of the public would be able to walk into a co-owned and co-housed radio-television station complex and be able to obtain machine copies of materials in the television public file, but would not be able to obtain copies of material in the radio file, even though much of the information is identical.

33. Thus far, this proceeding has dealt exclusively with television stations and their public files. We have not as yet addressed or solicited comments on the question of machine reproduction of material in the public file of radio stations. That matter will be addressed at a later date, possibly in conjunction with the question of whether the program logs of radio stations should be made publicly available. In the meantime, we cannot follow the urgings of Black Media. Accordingly, the

rule shall be adopted to cover only the public files of television stations, subject to the procedural requirements previously mentioned.

34. IT IS ORDERED, That pursuant to Sections 4(i), 303(f) and (g) of the Communications Act of 1934, as amended, Section 1.526 of the Commission's rules IS AMENDED effective August 30, 1974, by the addition of the following designated as paragraph (f). IT IS FURTHER ORDERED that this proceeding is TERMINATED.

§ 1.526 Records To Be Maintained Locally for Public Inspection by Applicants, Permitees, and Licensees.

* * * * * * *

(f) Copies of any material in the public file shall be available for machine reproduction upon request made in person, provided the requesting party shall pay the reasonable cost of reproduction. Requests for machine copies shall be fulfilled at a location specified by the licensee, within a reasonable period of time, which in no event shall be longer than seven days. The licensee is not required to honor requests made by mail but may do so if it chooses.

Federal Communications Commission.
Vincent J. Mullins, *Secretary.*

47 F.C.C. 2d

109-004—74——14

FCC 74-784

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re applications of PUERTO RICO TELEPHONE CO. For Consent To Transfer of Control of Licenses and Construction Permits in the Point-to-Point Microwave Radio Service and in the Telephone Maintenance Service.	File Nos. 4248-C1-TC - (32) - 74 17026-IT-7-T/C-54

MEMORANDUM OPINION AND ORDER

(Adopted July 17, 1974; Released July 19, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND QUELLO CONCURRING IN THE RESULT; COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The captioned applications, filed on May 22, 1974, propose the transfer of control of Puerto Rico Telephone Company (PRTC) from All America Cables and Radio, Inc. (AAC&R) to Puerto Rico Telephone Authority (PRTA). An informal opposition to this application was filed on June 26, 1974 by members of the Legislature of the Commonwealth of Puerto Rico elected under the New Progressive Party (hereinafter the Petitioners or NPP) ticket in the elections of November 1972. The Commonwealth of Puerto Rico and PRTA responded to this opposition by letter dated June 27, 1974.

2. The present owners (AAC&R is a subsidiary of International Telephone and Telegraph Corporation) and the Government of the Commonwealth of Puerto Rico met early this year to consider problems facing PRTC and alternative ways of providing adequate telephone and telegraph service to the citizens of Puerto Rico in the face of escalating costs and increased service demands. These applications result from a decision by the Commonwealth's legislature that communications have not kept pace with the economic and population growth of the island. On May 6, 1974, the legislature created the PRTA, having decided that future development of telephone service within the Commonwealth will be achieved most effectively if PRTC is owned by a public authority.

3. PRTC reportedly has nearly 425,000 telephones in service. It currently holds 36 licenses and construction permits for 32 point-to-point microwave stations and licenses for 7 stations in the Telephone Maintenance Service. The total plant of PRTC is valued at approximately $390,000,000. The borrowed capital of PRTC has now reached the point where it is without short-term borrowing power since its present short-term debt has reached the debt-equity limit permitted under its

broad indentures, jeopardizing its much needed capital improvement program.

4. The proposed merger would result in the substitution of PRTA as the sole common stockholder of PRTC. Under the agreement the common stock would be purchased from AAC&R for approximately $165,250,000. For each share of cumulative convertible preferred stock of PRTC (as of December 31, 1973, there were some 31,000 such shares issued and outstanding) converted into shares of ITT stock after December 31, 1973, PRTA will pay $75.00 to ITT. Of the purchase price, some $44 million will be in cash, and bonds are to be issued by PRTA to cover the remainder.

5. The NPP legislators make 6 allegations which are summarized as follows: first, the PRTA will not have the finances to satisfy the public need for telephone service in Puerto Rico; secondly, available data does not support the applicant's conclusion that it can improve telephone service; third, a possible conflict of interest exists on the part of three persons principally responsible for negotiation on behalf of the Commonwealth of Puerto Rico with ITT; fourth, $40 million in taxes that otherwise would have been paid into the Commonwealth Treasury is not required to be paid under the terms of the sale, and millions of dollars of future tax dollars are lost if the telephone company is publicly owned; five, a ten-year overseas revenue splitting agreement with AAC&R will result in a lowering of revenue to PRTA which might be offset by an increase in local exchange and toll rates; and six, private citizens would be in greater danger of having their telephone conversation intercepted by the Government if the telephone facilities are government owned. In general, PRTA and the Commonwealth took issue with each of these allegations and claimed that these same arguments were raised and later rejected in full debate before the House and Senate of Puerto Rico.

6. Before proceeding to consider these arguments, it would be appropriate to emphasize that the Commission's interest is based on the transfer of the radio facilities involved (the total plant of the telephone company is valued at $390 million, with the value of these radio facilities regulated by the Commission estimated at $17 million, or 4.4% of all facilities transferred). While the questions posed relate generally to the public interest in the sale of a Commission radio licensee, several appear to relate more to basic policy questions involving the provision of intrastate telephone service. Such policy matters involving only intrastate service have traditionally been considered a matter of state prerogative.[1] Therefore, to the extent that some of these arguments relate to whether the public interest would best be served by private or public ownership, we will not attempt to substitute our judgment for that of the Commonwealth. Moreover, to the extent that the allegations infer that there is a better alternative to the proposed transfer to PRTA, we should note that Section 310(b) of the Communications Act specifically precludes the Commission from considering whether the public interest might not better be served by transfer of the licenses to a party other than the proposed transferee. In view of

[1] See Section 2(b) of the Communications Act.

this, the arguments concerning rate levels and potential loss of revenue to the Commonwealth, are not considered relevant to our consideration of the captioned applications. As to the allegation that there will be greater danger of interception of telephone conversations by the Government, we cannot assume that PRTA will act in violation of local or federal laws prohibiting unlawful interceptions of conversations. (*See* 47 USC 605). The other questions raised are considered to have some degree of relevancy to our responsibility in determining the qualifications of PRTA to control a Commission radio licensee, and they are discussed in the following paragraphs.

7. As to the question of the financial viability of PRTA, the Petitioners argue that since the Commonwealth is in debt, it is not financially qualified to assume the necessary capital expenditures required for PRTC. The applicant states that the primary economic advantage of the proposed transfer is that PRTA will have independent borrowing powers not available to a private corporation, and that bonds of the authority are tax-free municipal securities, therefore making it possible to raise capital at lower interest rates. There is an additional stated advantage in that the PRTA has no corporate need to earn at a level above its costs and can therefore operate successfully on a break-even basis. Considering that PRTA will be an independent agency which has been given an "A" rating for its bonds, we cannot conclude that the deficit financial condition of the Commonwealth would adversely affect its financial ability.

8. Concerning Petitioners' fear that PRTA cannot improve the telephone service, PRTA states that it has retained Complan Associates, Inc., a firm which reportedly has recognized telephone expertise, to examine all aspects of the telephone company, including its facilities, its operations, its rates, and its finances. In addition to this support, after the acquisition the telephone company states it will continue to have available the resources of key ITT personnel on a consulting basis and that ITT has agreed to make available, on a contract basis, personnel such as central office design engineers, network management engineers, traffic engineers, outside plant engineers, customer service engineers and transmission engineers. PRTA indicates it has also reached agreement with AT&T for the provision of additional management and technical consulting services (we are advised that this arrangement has been cleared by the Department of Justice). There are no major management replacements contemplated at this time and the president will continue in his same capacity. However, the entire operation will be directed by a seven-man commission of the PRTA. The recently appointed chairman is reportedly extensively familiar with the telephone company, and the other four appointed members have varied experience in the business community of Puerto Rico. Two additional members of the PRTA will be elected by referendum.

9. From the foregoing, it appears that the PRTA has the requisite expertise to operate the radio and associated facilities involved. While it does appear to us that the transferee should be able to improve the telephone service, it is not necessary for us to render a positive finding in this regard. It is sufficient that our evaluation of the abilities of the licensee concludes that PRTA has the technical capability (or the

ability to acquire such capability) to adequately operate the radio facilities to serve the public interest.

10. Petitioners have brought to our attention that the Commonwealth Government has appointed a special prosecuting attorney to investigate the proposed transfer of control and determine whether any illegal or improper acts occurred with respect to the negotiations with ITT. It is alleged that conflicts of interest existed on the part of three persons (two are now Commissioners of PRTA) who negotiated on behalf of Puerto Rico with ITT.[2] It was also implied that the bank which would be handling the bond issue involved was selected on the basis of political influence rather than expertise.

11. While applicant acknowledges the investigation, it denies the existence of any conflict of interest or any other impropriety. It states that the bank has been a managing underwriter for bonds negotiated by public agencies and authorities of the Commonwealth of Puerto Rico for over 20 years. As for the business associations with ITT on the part of the government officials in the acquisition negotiations, applicant states that these ties were both publicized and subsequently severed.

12. The Commission has, of course, an obligation to consider the character of any person or persons that would hold or control radio licenses. To the extent that any commissioner of the PRTA would be involved in any activity that would reflect adversely on his character, the Commission would naturally be concerned. However, in considering the instant applications, it must be borne in mind that the ultimate transferee as proposed in this case is the Commonwealth of Puerto Rico. Any commissioner, and indeed the PRTA itself, is an agent of the Commonwealth. In connection with the investigation being conducted, we have received a copy of a preliminary report, dated July 11, 1974, which indicates that the special prosecuting attorney has not found thus far any evidence of an illegal or criminal act by any official representing the Commonwealth in the transaction. In view of these circumstances, we will not hold up action on the proposed transfer since the PRTA Commissioners are the Commonwealth's own employees and to our knowledge they have not been guilty of any wrongdoing. Therefore, considering all of the circumstances of this case, we do not believe it would be in the public interest to withhold action on these applications pending a final report of the prosecutor and perhaps action by a court.

13. A Traffic Agreement has been negotiated between PRTA and AAC&R providing for a 10 year contract under which (1) overseas revenue will be split 50–50 for 5 years, subject thereafter to renegotiation for the next 5 years; and (2) AAC&R will get at least 50% of the overseas traffic, with a minimum equal to the 1973 volume of messages in the first 5 years and 150% of the 1973 volume in the last 5 years. Petitioners allege that ITT wants to utilize this agreement as a competitive protective device against domestic communications' satel-

[2] The three alleged conflicts of interest are as follows: (1) a Commissioner of the PRTA (who also was a negotiator for the sale) was the Chairman of the Board of a corporation that had leased a hotel to ITT on a long-term basis; (2) another negotiator for the sale was on the Board of Directors of PRTC; (3) another Commissioner (who also was a negotiator for the sale) had been a Commonwealth banking official and apparently chose the financing institution to handle the bond sale.

lites anticipating that when said satellites go into operation lower transmission rates between the United States mainland and Puerto Rico would result except for this traffic agreement. This argument overlooks the fact that if PRTC remains in the hands of ITT, it would be likely to continue to interconnect with AAC&R for 100% of its traffic rather than the more limited amount of traffic provided for under the agreement. As for the 50–50 revenue split, this is a continuation of the present split between AAC&R and PRTC. Overall, the Traffic Agreement does not appear to be unusual or unreasonable.

14. Having considered the questions raised as we consider relevant to the transfer of control of the radio facilities involved, we believe that the transfer of control to PRTA would be in the public interest. Therefore, it is found that the proposed transfer of control would serve the public interest, convenience and necessity, and that PRTA is technically, financially and otherwise qualified to control the facilities authorized to PRTC.

15. Accordingly, IT IS HEREBY ORDERED that the captioned applications ARE GRANTED.

16. IT IS FURTHER ORDERED, that the aforementioned objections of NPP ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-682

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
REGIONAL BROADCASTERS OF MICHIGAN, INC.,
RADIO STATIONS WGRD-AM AND FM,
GRAND RAPIDS, MICH.
For Renewal of Licenses

JUNE 26, 1974.

REGIONAL BROADCASTERS OF MICHIGAN, INC.,
RADIO STATIONS WGRD AND WGRD-FM,
122 Lyon Street NW.,
Grand Rapids, Mich.

GENTLEMEN: The Commission has under consideration (1) your applications[1] for renewal of the licenses of Radio Stations WGRD and WGRD-FM, both in Grand Rapids, Michigan, (2) a complaint dated September 28, 1973 which alleged in substance that your promotion, "The Great Rip-Off", constituted hypoing of the April-May 1973 ARB audience survey in Grand Rapids, and (3) your responses to Commission inquiries[2] regarding the allegation. Your responses indicated that you subscribed to the April-May 1973 ARB survey in Grand Rapids conducted from April 12 through May 9, and that "The Great Rip-Off" was promoted from March 26 through May 9; prizes were awarded in the contest from April 12 through May 9. A list you submitted indicated that 579 prizes worth $16,744.82 were awarded; the prizes included an automobile ($2,500), a boat/motor/trailer ($1,500), an all-terrain vehicle ($1,200), $1,000 cash, and a motorcycle ($800). It appears that each prize or prize package was awarded in the following manner: following a broadcast announcement, telephone calls were accepted from listeners; the appropriate caller (third, fifth, or whichever ordinal number specified) won the prize or prizes offered.

Your responses also indicated that a Pulse survey was conducted in Grand Rapids in January-February 1973,[3] though you did not subscribe to it, and that you promoted "Hi-Lo" from January 9 through February 3. Your letters indicated that the four winners received prize packages valued at $1,433.48, $1,020.76, $1,015.90, and $394.43 (total value of all prizes was thus $3,864.57). You also stated

[1] The application for renewal of the license of WGRD (file BR-1822) was dated July 23, 1973 and that for renewal of the license of WGRD-FM (file BRH-1389) was dated June 18, 1973.

[2] The inquiries requested detailed information about contests conducted from April 1, 1972 through October 23, 1973. Your undated response to our inquiry of October 23, 1973 was received on November 12, 1973. Your second letter, in response to our inquiry of December 18, 1973, was dated February 11, 1974.

[3] The Commission has learned that the Pulse survey was conducted in Grand Rapids from January 15 through February 21, 1973.

that from approximately January 20 through March 1, 1973 you used ten billboards advertising "Hi-Lo" at various locations in the Grand Rapids area. Although you stated that, "WGRD frequently conducts outdoor advertising . . . concurrent with on-the-air promotions and contests," you did not give other examples of the use of billboards.

You also stated that you subscribed to the April–May 1972 ARB survey in Grand Rapids, conducted from April 13 through May 10, and that you broadcast "Heavy Wheels" from April 4 through 23. The principal prize in the contest was an automobile valued at $2,300; token prizes of model cars worth $1 each were awarded to 200 persons.

You listed 15 contests broadcast on WGRD and WGRD–FM during the period from April 1, 1972 through October 23, 1973. Significant information about all these contests is listed in the following table:

Contests	Dates promoted	Promotional announcements per hour	Cash value of all prizes	Greatest cash value to single winner	Number of prizes
Heavy Wheels*	Apr. 4 to Apr. 23, 1972	4	2,500.00	2,300.00	201
Great Race	May 15 to June 3, 1972	4	540.00	50.00	18
Frisbee Fly-In	June 20 to July 8, 1972	4	1,825.00	450.00	1,502
Checkmate	Oct. 10 to Oct. 22, 1972	4 to 5	1,669.35	4.00	465
Santa Contest	Nov. 24 to Dec. 21, 1972	2	1,534.00	45.00	78
Hi-Lo*	Jan. 9 to Feb. 3, 1973	5	3,844.57	1,433.48	43
Valentine Rip-Off	Feb. 6 to Feb. 11, 1973	3	1,056.25	5.95	375
Birthday Blowout	Mar. 6 to Mar. 16, 1973	4	1,627.00	25.00	119
Bunny Contest	Mar. 19 to Mar. 30, 1973	2	880.00	55.00	16
Great Rip-Off*	Mar. 26 to May 9, 1973	5	16,744.82	2,500.00	579
Great Race	May 29 to June 16, 1973	3	425.00	75.00	15
Beach Ball Rip-Off	July 16 to July 22, 1973	4	289.98	1.79	162
7-Up Rip-Off	Aug. 6 to Aug. 12, 1973	4	929.50	175.00	601
Hi-Steaks	Sept. 18 to Sept. 28, 1973	4	1,253.47	Unknown	5
Grand Pumpkin	Oct. 16 to Oct. 30, 1973	4	1,041.74	1,000.00	4

* Contests identified by an asterisk coincided with audience surveys conducted by ARB or Pulse

By way of explaining your use of contests, you stated that you have no policy or intent to use contests to influence audience surveys, that it is your policy to use contests in conjunction with other types of promotions to provide a vehicle for audience participation and to promote audience interest, and that you scheduled contests in response to competitors' promotions and as a normal part of your own programming. You stated that you made no changes in overall programming just preceding or at the time of audience surveys. You stated your belief that the number of winners in most promotions has considerable bearing on their attractiveness. You contended that the results of the April–May 1973 ARB survey did not suggest hypoing because WGRD's audience declined from that reported in the April–May 1972 ARB; and you stated that you had not misused survey reports in any way.

In our Public Notice concerning broadcast ratings adopted October 27, 1965, 1 FCC 2d 1087, we stated that we would take into consideration the guidelines set out in the Federal Trade Commission statement of July 8, 1965. Those guidelines, which were attached to our Public Notice, stated in part that licensees should not engage in activities calculated to distort or inflate audience data by, for example, conducting a special contest, varying the usual programming, or in-

stituting unusual advertising or promotional efforts, designed to increase audiences only during the survey period. Such variations from normal practices were considered to be hypoing.

It appears from the circumstances in this case that the total value of prizes awarded in "The Great Rip-Off" was substantially greater than the value of prizes awarded in any contest that you broadcast during a period when audience surveys were not being conducted; that the three most valuable prizes awarded in the contest exceeded in value the most valuable prizes awarded in non-rating-period contests; and that your timing of that portion of "The Great Rip-Off" most likely to increase listenership of your stations—the awarding of prizes—coincided exactly with the dates the ARB survey was being conducted in your listening area.

It also appears that the total value of prizes awarded in "Hi-Lo" was significantly greater than the value of prizes awarded in any non-rating-period contest; that the three most valuable prize packages awarded in "Hi-Lo" exceeded in value the most valuable prizes awarded in non-rating-period contests; and that you promoted "Hi-Lo" with billboard advertising, but may not have promoted any of your non-rating-period contests with billboards.

It further appears that the value of the single prize awarded in "Heavy Wheels" was much greater than the value of any prize awarded in a non-rating-period contest.

We recognize that WGRD and WGRD–FM have conducted many contests as part of their normal programming. However, in view of the circumstances described above, it appears that the "Heavy Wheels", "Hi-Lo" and "Great Rip-Off" contests constituted hypoing, since you knew or should have known that their likely effect would be a temporary increase in the size of the stations' audience during survey periods. Such unusual activities constituted hypoing whether or not there was in fact any increase in your share of audience. *Bass Broadcasting Co.*, 30 FCC 2d 861 (1971).

In view of the foregoing, the Commission has been unable to determine that the renewal of the licenses of Radio Stations WGRD and WGRD–FM for a full three-year term would serve the public interest, convenience and necessity. In order to provide an earlier opportunity for review of the operation of the stations, it is therefore granting renewal of the licenses of WGRD and WGRD–FM for a term ending October 1, 1975. During that term the Commission expects that you will take all necessary measures to preclude recurrence of the conditions noted in this letter.

Commissioner Quello concurring in the result.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-788

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 OF THE COMMISSION'S RULES TO PERMIT CROSSBAND OPERATION OR REPEATER STATIONS	Docket No. 20113 RM-2327

NOTICE OF PROPOSED RULEMAKING

(Adopted July 17, 1974; Released July 24, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. Notice of Proposed Rule Making in the above-entitled matter is hereby given:

2. The Commission has under consideration a petition (RM-2337) filed by the American Radio Relay League (ARRL). Petitioner requests the Commission to issue an Order modifying the second sentence of § 97.111(c) so as to permit repeater stations to be operated crossband, i.e., permit a repeater station to utilize an output (transmitter) frequency within a different frequency band than the input (receiving) frequency. The present rule requires both the input and output be within the same frequency band.

3. The ARRL suggests that a formal rule making proceeding is unnecessary for the proposed amendment since it would provide a relief from a present restriction. Although no specific statutory authority is cited, petitioner must reply upon § 553(b) of the Administrative Procedure Act, 5 U.S.C., and § 1.412(c) of the Commission's Rules, as authority to support his position. Pursuant to those subsections, general notice of proposed rule making must be published except in certain limited instances. Petitioner does not show that the proposed rule modification comes within those exceptions, and we do not believe any such exception could apply. Moreover, even if we put aside the requirements of the § 553(b) and further assume arguendo that every amateur licensee who operates or is interested in amateur repeater stations favors this proposed rule amendment, it is possible that this change will adversely affect the interests of other amateur operators, and they should be allowed to comment and express their views.

4. In support of the requested amendment, the ARRL offers the following claims and arguments:

A. Crossband operation of a repeater station having, for example, an input frequency in the 146–148 MHz band and an output frequency in the 222–225 MHz band, could reduce the costs of repeater stations and make more channels available. Repeaters using the wider frequency separation between the input and the output could benefit greatly through the alleviation of a receiver desensitization problem, a dif-

ficult one for amateurs to solve without considerable expense. Moreover, the present number of repeater input channels could be greatly expanded through the use of narrower channel spacing in the 146–148 MHz band, together with repeater input receivers with the necessary selectivity. Wider channel spacing of the repeater 222–225 MHz output channels would still permit the use of low cost mobile and hand-held units because of the relatively less selectivity required in the receiver section.

B. More efficient use of the spectrum could result. Crossband operation could make the use of other bands more practical, particularly in the frequency band 1215–1300 MHz.

C. Crossband operation of repeaters would permit amateurs to experiment with more sophisticated communications and new control procedures.

5. The request presented by the ARRL may have some merit. Our reason for the adoption of the rule prohibiting crossbanding, as stated in the Report and Order in Docket 18803, was to conserve frequency spectrum. The ARRL scheme for repeater stations to crossband a single channel would still only require one frequency pair, the same as required for a repeater not crossbanded. Their plan to use crossbanding as a means to provide more repeater channels within the same frequency segments would be an improvement in terms of spectrum conservation insofar as repeaters are concerned. How widely this scheme will be accepted by amateurs remains to be seen, since it could require substantial modifications to existing equipment. Also, it would probably result in the discontinuation of simplex segments in the repeater bands, which would not be an improvement in spectrum conservation. Furthermore, it is doubtful whether the costs saved in duplexing equipment would even be offset by the costs required to retrofit all of the users' equipment. It would appear that the more typical application of crossbanding, at least for the near future, would be the addition of one or more input and output frequency channels to an existing repeater. For example, a frequency pair in the 442–450 MHz repeater band might be added to an existing repeater already operating in the 146–148 MHz band. There would then be the capability for an amateur using 146–148 MHz transceiver to communicate with another amateur using a 420–450 MHz transceiver by means of the crossband repeater. In densely populated areas, the additional unoccupied frequency pairs required may not be available, as pointed out by the ARRL. However, in less populated areas, they would be available, and it is in these areas that crossbanding would have its greatest appeal.

6. Amateur repeater stations, at least as they are presently used, fundamentally provide a party line type of operation. That is, only one user can be retransmitted at a time while all others wait their turn. Consequently, there is a limit on the number of users any one repeater can accommodate, regardless of whether the repeater utilized 1, 2, 3, or more frequency pairs. As the limit is approached, user time would become so minimal and waiting time would become so excessive, in most instances it would become a necessity to terminate crossband operation in favor of independent repeaters. For this reason, we suspect there may be no need for the prohibition against crossband operation.

7. Crossband operation by repeater stations would be limited to those frequency bands authorized for repeater operation. New § 97.126 in Subpart E, *Prohibited Practices and Administrative Sanctions* would incorporate the current policy on other types of retransmissions. Only repeater stations, auxiliary link stations, and certain remotely controlled stations are licensed to automatically retransmit the radio signals of other amateur stations. By the term *automatic retransmit*, we mean retransmitting other signals in real time or very near real time. The best example of this is the type of retransmission performed by amateur repeater stations. An example of a prohibited practice would be the retransmission on the 14.0–14.35 MHz amateur band of another amateur station transmitting on the 144–148 MHz band, or vice versa. However, it is completely proper for an amateur operator at one station to receive a message from another station, and then later send the same message to a third station, such as done in many amateur traffic networks.

8. Authority for the proposed rule changes herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

9. Pursuant to applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before October 30, 1974 and reply comments on or before November 16, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision on the rules which are proposed herein, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

10. In accordance with the provisions of § 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, pleadings, briefs, or other documents shall be furnished the Commission.

11. All findings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's public reference room at its headquarters in Washington, D.C., (1919 M Street, NW.).

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. § 97.111(c) is revised to read as follows:

§ 97.111 OPERATION OF A REPEATER STATION.

* * * * * * *

(c) A repeater station may concurrently retransmit amateur radio signals on more than one frequency band authorized for repeater stations, but may not concurrently retransmit on more than one frequency channel within the same frequency band. A repeater station authorized to operate in conjunction with one or more auxiliary link stations for relaying radio signals, received at another location(s), to the repeater station may utilize input (receiving) frequencies

not available for repeater stations, provided the input frequencies to the auxiliary link station(s) are in frequency bands authorized to repeater stations.

* * * * * * *

2. New § 97.126 is added to read as follows:

§ 97.126 RETRANSMITTING RADIO SIGNALS.

No amateur radio station, except a properly licensed repeater station, auxiliary link station, or a remotely controlled station in a system with an auxiliary link station, may automatically retransmit the radio signals of other amateur radio stations.

FCC 74-769

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 1 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO REQUIREMENTS FOR ENGINEERS TO PRACTICE BEFORE THE FEDERAL COMMUNICATIONS COMMISSION	RM-1579

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 6, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. On March 10, 1970, the Association of Federal Communications Consulting Engineers submitted a petition in the above-entitled matter which proposes to amend appropriate rules in order to establish requirements for engineers preparing information for submission to the Commission and also to establish a public file of such engineers reflecting their professional status. The proposed rules read as follows:

1.28 *Persons Who May Be Admitted To Practice Engineering.* (a) Any person who is a registered or licensed Professional Engineer in any of the 50 states or the District of Columbia and is not under any restraint restricting his ability to practice engineering in that jurisdiction may prepare and sign any engineering information to be submitted to the Commission.

1.513(e) The engineering data portion of any application for CP, license, or renewal of any broadcast facility may be signed by a registered Professional Engineer as provided for in paragraph 1.28 or the applicant. Engineering portions of broadcast applications not relating to establishment of or changes in transmitter location, antenna system design and initial antenna performance or allocation matters may be signed by an employee of the applicant or licensee.

A statement supporting the petition was filed by the National Society of Professional Engineers. GT&E Service Corporation filed a statement asserting that the proposed rules would be permissive, would have no effect on GT&E and, accordingly, that it would take no position on the rules.[1] Statements opposing the petition were filed by the following individuals and groups:

American Telephone & Telegraph Company.
Association on Broadcasting Standards, Inc.
National Association of Broadcasters.
Putbrese, Fletcher & Healy, on behalf of various engineers practicing before the Commission.

[1] We do not read the proposed changes in the Rules as "permissive." Obviously, if they were "permissive" there would be no reason to adopt the proposed changes since qualified Professional Engineers may presently prepare and sign engineering data submitted to the Commission. Moreover, though the participants have concerned themselves principally with broadcast matters, proposed § 1.28 is not thus limited; and as broadcasting and other communications engineering matters are not easily separable, a rule of this kind should not be limited to broadcast practice.

William H. Hansher, et al., technical directors of broadcasting companies.
Peter V. Gurekis.
Clarence C. Moore.
E. Harold Munn.
Odes E. Robinson.

Petitioner filed a response to these statements on July 2, 1970.

2. In support of its proposal, petitioner states that there are two reasons for registering engineers and licensing them to practice: "First, to assure that whatever things or devices are built in accordance with the plans of the engineer are going to work properly and protect other parties and the general public from harm due to improper design or construction and secondly, to protect the possible builder or manufacturer of a device or product from the receipt of faulty design from an unqualified practitioner." Petitioner states that registration is a desirable and necessary step in determining the threshold qualifications of engineers and that practice before the Commission is one of the few areas where the requirement for licensing or registration does not exist. It argues, in effect, that the proposed restrictions on practice before the Commission will assure that engineering work is done properly and will protect the public from harm.

3. Statements opposing the petition stress the following points: that the professional engineering examination is a broad, general test which emphasizes the civil and/or mechanical aspects of engineering, which lacks broadcast engineering problems, and which only infrequently has a registration category pertaining to electronic engineering; that many jurisdictions, including the District of Columbia, permit registration of persons who have been engaged in the practice of engineering for a period of years without the requirement of an examination or test of educational qualifications of any kind; that petitioner's proposal does not assure that engineers qualified in the field of communications proposal would bar from practice before the Commission many engineers who are fully qualified by education and experience to perform the most advanced radio engineering functions; that the proposal would bar other qualified individuals (such as physicists) from submitting data or participating in hearings in matters related to engineering; and that engineering materials submitted to the Commission are reviewed by its own staff of communications engineers.

4. Petitioner's position, as stated in its response, may, we believe, be fairly summarized as follows: All persons who wish to practice engineering should meet minimum educational requirements and should practice only under a license issued by "responsible authority." Those who obtain such a license should be required to demonstrate their competence by passing an examination, should be subject to investigation prior to obtaining the license, and should be subject to disciplinary measures, including revocation of the license to practice engineering. Such measures would enhance the dignity of the engineering profession and the general competence and responsibility of its members. All of the States and the District of Columbia issue engineering certificates to those who qualify as Registered Professional Engineers under standards and procedures like those described above,

and require the certificate in certain circumstances and for the performance of certain engineering functions. The Commission should do no less. The certificate does not qualify an engineer for a particular job or for a particular specialty, such as communications engineering. Engineers who practice before the Commission should, of course, be qualified in that specialized field, but should also meet general professional standards for obtaining a license to practice. The Registered Professional Engineer, subject to professional standards, is likely to exercise greater discretion than others in limiting his practice to areas in which he is qualified and in referring prospective clients to those who are qualified in the field. Petitioner states on the one hand that practitioners who are qualified through long familiarity with communications work and the Commission's rules and who have not had the opportunity to meet the norms in their State for receiving a "grandfather" certificate should be "grandfathered" by the Commission. On the other hand, however, it suggests that "some or all the men practicing engineering before the Commission (may be) violating the law somewhere if they practice without a certificate." [2] Petitioner also indicates its belief that inferior or incompetent engineering materials have been or are being submitted to the Commission by unqualified practitioners, with damage to clients and burden on the Commission's engineering staff. Petitioner seeks, finally, to draw an analogy between the legal and engineering professions: since the Commission requires attorneys to be members of the bar of the State in which they practice even though bar examinations contain no questions on communications law, so should the Commission recognize the engineer's certificate and professional engineers' examination as a prerequisite.

5. In order to provide the Commission with additional factual information, the staff conducted telephone interviews with deans and professors of engineering at universities and colleges which are prominent in the field of engineering in various parts of the country, and with engineers at this Commission and at other federal government departments and agencies. Without exception, these persons, knowledgeable and active in the engineering profession, stated that unless an engineer planned to go into private practice or was involved with civil, electrical or mechanical engineering, the Professional Engineer's certification was not needed. It was pointed out that while state law required a consulting engineering firm to have at least one engineer with a Professional Engineer (P.E.) rating, associate engineers in such firms frequently did not have a P.E. rating. Apparently, the number of P.E.'s is greater in firms emphasizing civil, mechanical, or electrical engineering. In these areas, state building codes, municipal ordinances, and federal building requirements establish standards which prevail and which must be met before an antenna tower can be constructed or electrical wiring could be installed. Engineers doing these types of construction work are generally required by local, state or federal law to be registered Professional Engineers.

[2] If petitioner believes this to be the case, it is at liberty to raise the question in the appropriate jurisdictions. Under Commission rules, the competency or adequacy of the engineering data submitted and of the engineer submitting it may be challenged by the Commission or by appropriate persons. We expect persons who do engineering work in connection with Commission proceedings to be legally qualified to do such work in the jurisdiction where the work is done.

6. While efforts by members of a profession to raise its standards are in themselves commendable, we are not persuaded by the information presented to and developed by the Commission that the public interest would be served by the institution of rule making proceedings looking toward adoption of the proposed rules. Our conclusion is based on two general propositions: (1) An engineering certificate is needed only in particular circumstances and for particular functions essentially unrelated to the practice of communications engineering before this agency; and (2) the Commission is generally satisfied with the quality of engineering materials submitted for its consideration and, this being the case, should not and is not inclined to impose standards of practice higher than those considered generally acceptable by State authorities and by responsible members of the engineering profession. We would note in this respect that a graduate engineer is required to practice engineering for a period of years before becoming eligible to apply for a Professional Engineering certificate and that such a certificate is obviously, therefore, not a "threshold" requirement for the practice of engineering. A Professional Engineering certificate, moreover, is not generally required for employment as an engineer with the Federal Government or with this agency. Absent special circumstances, which are not apparent, it would seem to us unreasonable and highly inconsistent to impose standards on practitioners which are higher than those demanded by the Commission of its own engineering staff. As is clear from these considerations, moreover, the suggested analogy between the legal and engineering professions is inapt; while State laws require that all attorneys who practice in the State in whatever capacity be licensed, no similar state law applies to all engineers.

7. Although petitioner states that the public safety will be better served by the Commission's adopting its proposed Rule, our investigation and experience does not support that argument. Basically, the Commission's concern is with the communications engineering characteristics of an application, not with its construction characteristics. Every state and municipality (including the District of Columbia) has building codes and ordinances which establish standards and requirements which must be met in order for a structure of any kind to be built or wired.[3] Our experience supports the continuation of our practice of leaving this area to the state and local jurisdiction. Our information indicates that almost universally such construction engineering plans and designs must be signed by a licensed or registered Professional Engineer. There seems to be little reason in terms of public safety for changing our existing rules to require data or hearing testimony on communications engineering projects or problems submitted to us be signed or presented by a registered Professional Engineer.

8. The Commission naturally wishes to encourage high ethical and professional standards in those appearing before it in a professional capacity. In the absence of a showing of special need in its

[3] While the Commission does not receive construction engineering data among the other engineering materials submitted, we rely on the applicant's conformance with the relevant building codes in the state or municipality where the construction or wiring would be undertaken. Should a lack of such conformity be brought to our attention, the Commission might well take cognizance of this nonconformity.

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proceedings, however, it is not prepared to go beyond standards which are acceptable to the community and to responsible elements of the engineering profession. Considered in this context, the arguments advanced by the Association of Federal Communications Consulting Engineers are not persuasive, and its Petition for Rule Making (RM–1579) accordingly is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-791

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE FOR SEPARATION OF FUNCTIONS IN RESTRICTED RULEMAKING PROCEEDINGS	RM-1889

ORDER

(Adopted July 17, 1974; Released July 25, 1974)

BY THE COMMISSION: COMMISSIONER WASHBURN NOT PARTICIPATING.

1. The Federal Communications Bar Association (FCBA) [1] petitions that we amend Part 1 of the Rules to separate the duties of advocate and decision maker in restricted rulemaking proceedings.[2] The Petition addresses the practice, no longer prevalent in current cases, of permitting those members of the Common Carrier Bureau trial staff, participating as trial counsel in an evidentiary rulemaking hearing, to prepare a recommended decision upon the conclusion of the hearing. Commingling these functions, the FCBA argues, is irreconcilable with sound administration, fair play, and decisional objectivity.[3] The FCBA urges that we adopt the recommendation of the Administrative Conference of the United States,[4] which suggests limiting the role of the trial staff to advocacy, and reposing in the officer presiding at the hearing the responsibility for issuing the intermediate decision.

2. Although it clearly is lawful to use a trial staff in a dual capacity,[5] in recent years we have restricted this practice, in recognition of its deficiencies. The procedure we presently employ in many restricted rulemaking proceedings coincides with the substance of the FCBA proposal. Commencing with the AT&T rate case in 1971,[6] we have with few exceptions declined to invest the trial staff participating in a hearing with decisionmaking responsibility.[7] The new procedure, im-

[1] The FCBA is a voluntary non-profit association serving as spokesman for members of the legal community practising before this Commission.

[2] Upon receiving the petition, we issued a Public Notice (FCC Report No. 795) inviting comments within 30 days from interested persons. No comments were submitted.

[3] The FCBA states that the staff's dual role has been criticized in *American Telephone and Telegraph Co.* v. *FCC*, 449 F. 2d 439 (2d Cir. 1971). We note, however, that the court sustained the lawfulness of the dual role, ruling it permissible under § 409(c) of the Communications Act, § 5(c) of the Administrative Procedure Act (APA) and the Due Process clause of the Fifth Amendment. 449 F. 2d at 439–455.

[4] Recommendation No. 19, S. Doc. No. 24, 88th Cong. 1st Sess., pp. 109–110 (1963). The FCBA states that the American Bar Association has approved a similar recommendation. See, *Administrative Law Review*, v. 23, No. 1, pp. 67, 73 (1970).

[5] *American Telephone and Telegraph Co., supra; Wilson & Co.* v. *U.S.*, 335 F. 2d 788, 797 (7th Cir. 1964); *cert. den.*, 380 U.S. 951 (1965); 40 F.C.C. 2d 908 (1973); 14 F.C.C. 2d 568 (1968); 2 F.C.C. 2d 877 (1966); 2 F.C.C. 2d 142 (1965).

[6] Docket No. 19129, 27 F.C.C. 2d 151 (1971).

[7] In the following proceedings we have granted the staff a dual role: Docket No. 19691, 38 F.C.C. 2d 691 (1973); Docket No. 19609, 37 F.C.C. 2d 721 (1972); Docket No. 19591, 37 F.C.C. 2d 333 (1972); Docket No. 19419, 33 F.C.C. 2d 518 (1972).

plemented at the outset of a hearing,[8] directs the administrative law judge to prepare an intermediate decision, and precludes the trial staff from making any ex parte oral or written presentations to the administrative law judge or the Commission.[9] However, the new procedure did not cut off the separated trial staff from the rest of the Bureau. As we stated [10]:

> The separation of the Trial Staff in 19129 was not intended to separate that staff from other personnel or resources of the Common Carrier Bureau. The Trial Staff is free to consult with any other member of the Bureau. The separation of the Trial Staff in 19129 simply means that such staff:
>
> (1) will not make any oral presentations to the Examiner or the Commission without the other parties being present, and
>
> (2) will not make any written presentations to the Examiner or the Commission which are not served on the other parties.[4]
>
> [4] See 27 F.C.C. 2d 149 at 157, Selected reports of the Administrative Conference of the U.S., 88th Cong., 1st Sess. S. Doc. 24 at pp. 85–6, 190–110.

3. The knowledge and experience we have gained from the use of separated trial staffs persuades us to establish a policy of separation and to incorporate this policy in the *ex parte* rules found in Part One of our Rules, Sections 1.1201 *et seq.*

4. At present, in restricted rulemaking proceedings where a separated trial staff has been designated, the individuals on such staff are prohibited from making any *ex parte* presentations to the Administrative Law Judge or the Commission. We are prepared to increase the separation of trial staffs so that they are separated also from key decisional personnel in the Bureau and from the Office of the General Counsel. Accordingly, and on the effective date of rules here adopted, in all future cases where a separated trial staff is designated to participate, the Chief, Hearing and Legal Division and his entire staff will be separated not only from the Commission and the presiding Administrative Law Judge but also from the Office of the General Counsel, Chief and Deputy Chief of the Common Carrier Bureau and all Division Chiefs in the Bureau.[11] In those rulemaking proceedings where the Chief, Hearing and Legal Division determines that the Hearing and Legal Division staff should be augmented for the purposes of the individual proceeding, he may request that personnel in any of the Bureaus or Offices, other than the Office of General Counsel, of the Commission be assigned as separated personnel for the duration of the particular rulemaking proceeding—and that proceeding only—to act as witness, counsel or to prepare written presentations to be made in the proceeding. When consent to such temporary staff assignment is received from the Chief of a Bureau or Office, the Chief of the Hearing and Legal Division will list the name(s) of such personnel in a Public Notice and such personnel will, of course, no longer be considered decision-making personnel for the purposes of the pro-

[8] See, 32 F.C.C. 2d 89 (1971).

[9] We have declined, and will continue to decline, however, to order separation of functions retroactively in proceedings wherein we had assigned the trial staff a decisional role, owing to the disruption this would entail. Docket No. 19691, 41 F.C.C. 2d 239 (1973); Docket No. 19419, 40 F.C.C. 2d 908 (1973).

[10] 32 F.C.C. 2d 89 at 90.

[11] This new policy will also apply to existing cases where we have designated that a trial staff of the Common Carrier Bureau will participate. However in the Comsat Rate Case, Docket 16070, 38 F.C.C. 1286 (1965) and the AT&T Rate Case, Docket 19129, 27 FCC 2d 151 (1971), the separated personnel are those listed in Public Notices issued in those Dockets. If supplementary notices are appropriate they should now be issued.

ceeding. Hearing and Legal Division personnel and others, when specifically designated for particular cases, will not take part in the decision-making process. Our action here does not, however, deprive separated trial staff personnel of their present right of unrestricted access to the personnel and resources of the Bureau (with the exception of the Chief and Deputy Chief of the Common Carrier Bureau and all Division Chiefs) and Commission staff (with the exception of the Office of General Counsel), traditionally exercised by the Bureau once the rulemaking has been designated.[12]

5. Separated trial staff personnel will be free, as trial staffs have been in the past, to talk not only to parties, individually, in the case and listen to their arguments, but also to most Commission personnel and draw on their resources, knowledge and expertise for the purpose of the proceeding. With this freedom we believe that the Commission and all other personnel involved in the restricted rulemaking decisionary process will receive the maximum in objective analysis and informed expertise from the Chief of the Hearing and Legal Division and his staff.

6. Sections 4(i), 201(b), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 201(b), and 303(r) furnish authority for amending § 1.1209(d). Since these are procedural amendments, the prior notice and effective date provisions of 5 U.S.C. § 553 do not apply.[13]

7. Accordingly, IT IS ORDERED, effective July 31, 1974 that § 1.1209(d) of the Rules is amended as set forth in the appendix hereto.

8. IT IS FURTHER ORDERED, that pursuant to § 1.407 of the Rules the petition of the FCBA is GRANTED to the extent indicated herein. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

In Part 1 of Chapter I Title 47 of the Code of Federal Regulations, Section 1.1209(d) is amended to read as follows:

§ 1.1209 DECISIONMAKING COMMISSION PERSONNEL (RESTRICTED RULEMAKING PROCEEDINGS).

* * * * * * *

(d) The Chief of the Common Carrier Bureau and his staff; *Provided, however;* that in any restricted rulemaking proceeding where the Commission directs a separated trial staff to participate, the Chief, Hearing and Legal Division of the Common Carrier Bureau shall be a party in the proceeding and he and his staff shall be non-decisionmaking personnel. In such cases the Chief of the

[12] The only changes we are making in our present procedures are (1) to enlarge the separation to include the Office of General Counsel, and the Chief, Deputy Chief and Division Chiefs, (2) to designate the Chief, Hearing and Legal Division as a party in restricted rulemaking proceedings instead of an unnamed trial staff, and (3) to separate all personnel of the Hearing and Legal Division and not just a designated trial staff.

[13] We are also exploring the feasibility of separating in adjudicatory cases only the Hearing and Legal Division and not the remainder of the Bureau. See section § 554(d)(2)(B) of the Administrative Procedure Act.

Hearing and Legal Division and his staff will be separated from the Commission, the presiding Administrative Law Judge, the Office of the General Counsel, and the Chief and Deputy Chief and all Division Chiefs of the Common Carrier Bureau, but are unrestricted in their access to all other Commission personnel.

NOTE: Notwithstanding the requirements of § 1.1221 or any other provision of this chapter to the contrary, in restricted rulemaking proceedings, the Chief, Hearing and Legal Division and his staff shall be separated from decisionmaking personnel only to the extent indicated in this paragraph.

* * * * * * *

FCC 74–708

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
REX TV, INC., REXBURG, IDAHO	SR–37243 (ID053)
Requests for Special Relief	CSR–53 (ID053)
and	
Request for Order To Show Cause Directed Against	
REX TV, INC., REXBURG, IDAHO	CSC–51 (ID053)

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 17, 1974)

BY THE COMMISSION:

1. On April 25, 1973, KID Broadcasting Corporation, licensee of Station KID–TV, Idaho Falls, Idaho, filed a "Petition for Issuance of Order to Show Cause" (CSC–51) directed against Rex TV, Inc., operator of a cable television system at Rexburg, Idaho. KID's petition asked that Rex TV be directed to show cause why it should not be ordered to cease and desist from violating the program exclusivity requirements of the Commission's cable television rules. On May 25, 1973, Rex TV filed a "Motion to Dismiss and Opposition" which relies on its March 10, 1972, "Petition for Waiver" (SR–37243) filed in response to KID's exclusivity request of February 24, 1972, and a similar notification made by The Post Company, licensee of Station KIFI–TV, Idaho Falls, Idaho. Rex TV contends that its waiver request invoked the automatic stay provision of the Commission's Rules (former Section 74.1109(h)) entitling the system to refrain from providing exclusivity protection to these stations pending the Commission's disposition of the matter.[1]

2. The Rexburg System operates in the Idaho Falls-Pocatello, Idaho, smaller television market, which is located in the Mountain Time Zone. It carries the following signals:[2]

[1] Both KID and Post had originally requested network exclusivity protection. In addition, KID requested, by letter to Rex TV on July 13, 1972, protection of non-network programming pursuant to the provisions of Section 76.99.

Section 76.99 states as follows: "The provisions of §§ 76.91, 76.93, 76.151, and 76.153 shall not be deemed to deprive a television station whose signal was carried by a cable television system prior to March 31, 1972, of the nonnetwork program exclusivity rights that such station had on March 30, 1972; *Provided, however,* That such exclusivity rights shall extend only to simultaneous duplication of programing by lower priority television stations, unless the station whose exclusivity rights are at issue is entitled to same-day network program exclusivity pursuant to § 76.93(b), in which case that station shall also be entitled to continued same-day nonnetwork program exclusivity."

[2] We note that on April 26, 1974, the system filed notice, pursuant to Section 76.11(a) of the Rules, of its intention to add the signal of newly operational Television Broadcast Station KPVI (ABC, Channel 6), Pocatello, Idaho. No objection to such carriage has been filed with the Commission. Rex TV's carriage of this new station will not affect the rights of Stations KID–TV and KIFI–TV to exclusivity protection.

KID–TV (CBS/ABC, Ch. 3) Idaho Falls, Idaho
KIFI–TV (NBC/ABC, Ch. 8) Idaho Falls, Idaho
KBGL–TV (Educ., Ch. 10) Pocatello, Idaho
KUTV (NBC, Ch. 2) Salt Lake City, Utah
KCPX–TV (ABC, Ch. 4) Salt Lake City, Utah
KSL–TV (CBS, Ch. 5) Salt Lake City, Utah
KUED (Educ., Ch. 7) Salt Lake City, Utah
KBYU–TV (Educ., Ch. 11) Provo, Utah
KWGN–TV (Ind., Ch. 2) Denver, Colorado

3. Rex TV supports its petition for special relief (SR–37243) on several grounds. It first argues that Stations KID–TV and KIFI–TV are not entitled to program exclusivity on the subject system as neither station, allegedly, has an "actual" Grade B contour encompassing Rexburg. The system operator notes the "hilly terrain" between Rexburg and the two stations' antenna site and refers to its administration of signal strength measurements in Rexburg, which, according to Rex TV, indicate ". . . significant variances in signal strength . . ." some higher and some lower than the required signal strength level. Secondly, it is asserted that the Rexburg system has fewer than 500 subscribers. Citing the Commission's Public Notice of March 7, 1968 (FCC 68–259) announcing a "Temporary Modification of Processing Priorities in Section 74.1103 Waiver Cases" and *Spencer Community Antenna System, Inc.*, 22 FCC 2d 57 (1970), Rex TV maintains that Commission policy holds ". . . that it would be a hardship to require systems with less than 500 subscribers to comply . . ." with the exclusivity rules. In its waiver request of March 10, 1972, Rex TV submits that it serves 483 subscribers. Additionally, Rex TV argues that Stations KID–TV and KIFI–TV ". . . have not been complying fully with the notification requirements . . ." of the Rules, alleging there have been ". . . several instances where the stations have claimed exclusivity protection with respect to a program, and the program has not been broadcast by the distant station on the same day or simultaneously as indicated by the notification for protection." Rex TV further asserts that the stations ". . . have also asked for protection on the basis of an accompanying program schedule, and without notifying petitioner, the stations have changed that schedule." Further complicating the matter of exclusivity protection, Rex TV contends, ". . . the stations frequently fail to start and end programs on time, or on the customary hourly, half hour, or quarterly time segments." Petitioner cites, in its reply to opposition, three occasions where programs for which KID had requested exclusivity were, allegedly, either not carried by KID–TV or were "not carried at the same time by the out of town station." [3]

4. KID and Post argue in opposition that: (a) their signal strength contours entitle them to the requested program exclusivity because Rex TV has not presented a showing sufficient to rebut the presump-

[3] At the time of the system's reply (after the adoption of the *Cable Television Report and Order* and before the effective date of the *Reconsideration* thereof) the Commission's rules requird only simultaneous exclusivity protection in the Mountain Time Zone.

tion of service indicated by these predicted contours;[4] (b) additions to the system's subscriber total will soon preclude any reliance on the Commission's announced policy of exempting certain systems with fewer than 500 subscribers from the obligation of providing exclusivity; and (c) Rex TV has received proper notification and cannot rely on a few allegedly deficient notifications as ground for waiver, KID asserts that failure to start and end programs on time, if indeed such occurrences have taken place, happen only rarely and only because of factors beyond the station's control. Post asserts that it ". . . adheres to its network contract and broadcasts its network programs in conformity with the length of the programs received from the networks." In addition, Post argues that Rex TV is operating in violation of a specific written agreement of June, 1970, the provisions of which, it is alleged, acknowledged that Rexburg is within the predicted Grade A contour of Station KIFI–TV and agreed that the system would refrain from carrying signals that would duplicate the programs broadcast on the same day by Station KIFI–TV where the duplicating station did not place a Grade A signal over Rexburg. In reply to this point, Rex TV contends that the agreement, by its terms, was effective only so long as the system was required by the Commission's Rules to provide same day exclusivity protection. Therefore, Rex TV maintains that the agreement was clearly void as of March 31, 1972, the effective date of the *Cable Television Report and Order*, which reduced the scope of exclusivity protection from "same day" to "simultaneous." On April 14, 1972, Post filed a petition for special relief (CSR–53) requesting a continuation of same day exclusivity for KIFI–TV. Following the adoption of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972), which restored same day exclusivity protection to Mountain Time Zone stations, this petition was dismissed as moot by the Chief, Cable Television Bureau. Post insists its petition was not moot because of Rex TV's continued reluctance to grant even same day exclusivity, and that the pleadings filed by Post in that special relief proceeding should be associated with the file of Rex TV's petition. Post's petition for reconsideration was opposed by Rex TV.[5]

5. On January 7, 1974, The Post Company filed a "Supplement to Opposition to Petition for Waiver," which reiterates many of the arguments it set forth in previous pleadings relating to SR–37243 and directs the Commission's attention to Rex TV's 1972 FCC Form 325. Rex TV filed a "Response to Supplement" on January 29, 1974, which concedes a December 31, 1972, subscriber total of 778. However, Rex TV refers to its 1972 FCC Form 326–A which reports an average of "only" 587 subscribers during calendar year 1972. The system points

[4] KID notes further that Rex TV receives its Salt Lake City distant signals from a microwave facility located on the same mountaintop as Station KID–TV's transmission tower. KID reasons that if Rex TV is able to receive the Salt Lake City signals via the microwave facility on the mountaintop, the residents of Rexburg should also be able to receive, off the air, the television signal of Station KID–TV.

[5] We note that KID also filed a petition for special relief (CSR–31) with regard to continuation of same day exclusivity on the Rexburg system and that it was similarly dismissed as moot on November 21, 1972. While KID did not seek reconsideration of this dismissal, it did request, by letter of December 21, 1972, that the pleadings therein be associated and considered with Rex TV's petition for waiver (SR–37243) or, in the alternative, that Rex TV's petition be dismissed by the Commission. A letter in opposition was filed by Rex TV on January 5, 1973.

out that Rexburg is a "college town" and that an "inordinate" number of subscriber disconnections result during school vacation periods. Furthermore, Rex TV argues that the provision of exclusivity protection would (a) make its cable services less attractive, (b) likely result in fewer subscribers, and (c) place in doubt the system's ability to continue payments for microwave importation of several distant signals. Finally, Rex TV reiterates its allegation that Station KIFI–TV does not place an actual Grade B contour over Rexburg and asks that the Commission postpone its ruling in this case until it has completed action on certain rulemaking proceedings concerning program exclusivity. On March 8, 1974, The Post Company filed a letter with the Commission enclosing a brief questionnaire sent to the Rexburg system. The questionnaire, which is allegedly sent on a periodic basis to cable systems and translators which carry the signal of Station KIFI–TV, asks, *inter alia*, for an evaluation of the picture quality received. The form provides for a response of "poor," "good," or "excellent." The questionnaire allegedly returned from Rex TV in January, 1974, checks "excellent" as the system's response to the signal quality inquiry. Post maintains that such a questionnaire response further contradicts Rex TV's assertion that Station KIFI–TV does not place a Grade B signal into the Rexburg area.

6. It is uncontested that Rexburg lies well within the predicted Grade B contours of both Stations KID–TV and KIFI–TV; indeed, Rexburg lies within the predicted Grade A contour of Station KIFI–TV and only a few miles from that of Station KID–TV. Moreover, Rex TV has failed to establish that the actual Grade B contours of KID–TV and KIFI–TV fall short of Rexburg. (See *Community Service, Inc.*, 21 FCC 2d 719, 724 (1970) and *Shen-Heights TV Association*, 11 FCC 2d 815, 819 (1968)). We note that both Stations KID–TV and KIFI–TV are significantly viewed in Madison County, Idaho, in which Rexburg is located.[6] However, Rex TV also requests relief because of its small number of subscribers. As stated above, Rex TV reported 778 subscribers in its latest filing of FCC Form 325. This disclosure rules out any reliance on the processing priorities established in the "Temporary Modification of Processing Priorities in Section 74.1103 Waiver Cases," Public Notice of March 7, 1968 (FCC 68–259), or on Commission precedents exempting certain systems with less than 500 subscribers from the exclusivity obligations of the Rules.[7] Finally, consistent with *Brownwood TV Cable Service*, 31 FCC 2d 570 (1971), and *Crawfordsville Community Cable Corp.*, 28 FCC 2d 632, 633 (1971), Rex TV's contention that alleged deficiencies in particular programming notices are sufficient grounds for granting waiver of the exclusivity rules must be rejected. We have never considered a few instances of an inadequate notification to constitute a basis on which to grant a general waiver of these rules.

[6] See Appendix B, *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 at 394.

[7] In its *Report and Order in Docket No. 18*[illegible]*85*, FCC 74–299, —— FCC 2d ——, the Commission formally codified this exemption of systems serving fewer than 500 subscribers by the addition of Section 76.95(c) to the Commission's program exclusivity rules. Section 76.95(c) of the Rules provides as follows: (c) Any cable television system (as defined in Section 76.5(a)), having fewer than 500 subscribers need not comply with the provisions of Sections 76.91 and 76.93.

7. In view of the foregoing we must deny Rex TV's request for waiver of our exclusivity rules. Consistent with the special exclusivity protection afforded Mountain Time Zone stations, KID–TV and KIFI–TV must receive same-day protection for their respective network programs.[8] Because of its further request for continued non-network exclusivity protection, KID–TV shall receive such same day protection pursuant to the provisions of Section 76.99 of the Rules.[9] In light of the above we shall dismiss, as moot, the "Petition for Issuance of Order to Show Cause" (CSC–51) filed by KID Broadcasting Corporation, as well as the "Petition of The Post Company for Reconsideration" filed by the licensee of Station KIFI–TV in connection with our previous dismissal of CSR–53.

Accordingly, IT IS ORDERED, That the "Petition for Waiver" (SR–37243) filed March 10, 1972, by Rex TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Rex TV, Inc., IS DIRECTED to comply with the requirements of Sections 76.91, 76.93, and with respect to non-network programming of Station KID–TV, Idaho Falls, Idaho, Section 76.99, on its cable television system at Rexburg, Idaho, within thirty (30) days of the release date of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED, That the "Petition for Issuance of Order to Show Cause" (CSC–51) filed by KID Broadcasting Corporation, licensee of Station KID–TV, Idaho Falls, Idaho, IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Petition of The Post Company for Reconsideration" (CSR–53) filed by The Post Company, licensee of Station KIFI–TV, Idaho Falls, Idaho, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[8] In *Magic Valley Cablevision, Inc.*, FCC 73–94, 39 FCC 2d 166 (1973), and *Multi-Vu of Idaho*, FCC 73–280, 40 FCC 2d 988 (1973), the Commission discussed the showing a Mountain Time Zone cable television system must make in order to obtain relief from the imposition of same-day exclusivity. If Rex TV, Inc., desires to pursue the matter, it must address itself to the effect simultaneous exclusivity will have on a station's prime time programming.

[9] As Rexburg is located in a smaller television market, in which syndicated exclusivity protection does not usually apply, KID is permitted to retain non-network programming protection on a grandfathered basis, as explained in Section 76.99, *supra.*

FCC 74-789

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 0 AND 2 OF THE RULES RELATING TO EQUIPMENT AUTHORIZATION OF RF DEVICES.	Docket No. 19356

MEMORANDUM OPINION AND ORDER

(Adopted July 23, 1974; Released July 30, 1974)

BY THE COMMISSION:

1. The Commission has before it a number of petitions requesting reconsideration of the Report and Order adopted on February 6, 1974, in the above-described proceeding. The history of this proceeding is described in that Report and Order.[1]

2. Although not restricted to these matters the concern of the petitioners centers mainly upon equipment identification and labeling requirements as well as the Commission's use of the word "identical". Consequently, the Commission acting upon a request embodied in one of the petitions[2] deferred the effective date of four sections of the Report and Order which are provisions for identification and labeling. The stay deferred the effective date of Sections 2.925, 2.969, 2.1003 and 2.1045 until June 25, 1974[3] and was extended until August 2, 1974.[4]

3. The petitioners are: Amana Refrigeration Inc. (Amana); the Association of Home Appliance Manufacturers (AHAM); the Consumer Electronics Group of the Electronic Industries Association (EIA-CEG); the Land Mobile Section of the Communications Division of the Electronic Industries Association (EIA-LM); RCA Corporation; Society of the Plastics Industry, Inc. (SPI).[5]

4. Sections 2.903, 2.905, 2.907, 2.908, 2.932, 2.967, 2.1001 and 2.1043[6] deal with the Commission's use of the word "identical" as well as the modification and change of authorized equipments. Addressing itself solely to the application of these rules to microwave ovens that are type approved by the Commission, Amana, supported by AHAM, contends that a financial hardship could be precipitated by the requirement for new type approvals in those instances where only the type number might be changed due to component substitutions caused by

[1] 39 FR 5912, February 15, 1974.
[2] Petition for reconsideration submitted by the Consumer Electronics Group of the Electronic Industries Association.
[3] 39 FR 12351, April 9, 1974.
[4] 39 FR 25324, July 10, 1974.
[5] A petition for stay of the effective date of the Report and Order in this proceeding was filed with the Commission by the Society of the Plastics Industry, Inc. simultaneously with its petition for reconsideration. See paragraph 10 for the disposition of this petition.
[6] Section numbers refer to those of the Report and Order in this proceeding 39 FR 5912, February 15, 1974.

parts and materials shortages. It argues that even with allowances for mechanical manufacturing tolerances, it is impossible to manufacture microwave ovens identically, and 100% testing is impractical in determining whether or not the ovens are electronically identical as the required exhaustive testing would be prohibitively time-consuming. Amana recommends, therefore, that the word "identical" be deleted or modified to permit minor mechanical differences and requests exclusion of the need to test each oven to determine whether or not it is electronically identical to the sample tested by the Commission and urges that Section 2.903(b) be revised to read ". . . mechanically identical in all significant respects . . ." instead of ". . . identical in all respects . . .". Amana further contends that marketing should be permitted pending approval of changes when a manufacturer has tested its product and no change of interference capability can be found which differs from that determined by the Commission based upon a previously submitted sample.

5. Amana alleges that requiring a new type approval for every change, no matter how trivial, will impose a serious financial burden on the manufacturer, and urges the Commission to permit minor changes without requiring a new type approval. In particular, it argues that type approval fees should not be charged for a change in brand name when a unit is otherwise the same as that previously type approved.

6. EIA–LM also raises questions concerning the use of the term "identical" in Section 2.905 and Section 2.907. Observing that in discussions with the FCC staff it was indicated that the Commission did not intend the word "identical" to negate the permissive changes permitted by Section 2.1001 and 2.1043, EIA–LM requests that the language in Sections 2.905 and 2.907 be amended to clarify this intention. Moreover, EIA–LM contends that the requirement for a new type acceptance or certification of a non-identical equipment will constrain the land mobile "specials" market designed to satisfy individual needs. Additionally, strict observance of the "identical" requirement will encourage foreign competition, since foreign equipment is essentially standardized and can readily meet the identical requirement.

7. SPI calls attention to its original comment in this proceeding and recommendation to revise Section 2.1041 (redesignated as Section 2.1043 in Appendix B to the Report and Order) dealing with changes in certificated equipment. SPI reiterates that the alternative language it had proposed was designed to relieve both industry and the Commission of unnecessary applications while, at the same time, assuring user compliance with the technical specifications of FCC Rules Part 18. SPI points out that the manufacturer cannot foresee all the changes that users will make to suit the requirements of the work being performed.

8. It appears that our intent with respect to ISM equipment was not made sufficiently clear.[7] We pointed out that it was our intention to impose a requirement on the manufacturer to deliver equipment to the user that could reasonably be expected to comply with our Part 18 requirements, under normal operating conditions. We did not intend

[7] Paragraph 15 and 16 of Report and Order.

to make the manufacturer responsible for changes made by the user. In any event, we recognized that an across the board requirement for bilateral certification for all industrial heating equipment was not suitable, and we indicated (Report and Order paragraph 16) that a separate proceeding would be instituted to conform Part 18 to these new procedures.

9. We reiterate that intention herein. A separate proceeding will be instituted which will spell out in detail, how these new procedures will apply to industrial heating equipment operating under Part 18. Until this part is conformed, industrial heating equipment may continue to operate under the procedures currently set out in Part 18. The question of multiple applications due to changes in industrial heating equipment will be dealt with in that proceeding. As a practical matter, Section 2.1043 has been revised to permit certain permissive changes in certificated equipment. The Commission believes that this change will allay the fears expressed by SPI.

10. In view of our expressed intention to treat industrial heating equipment in a separate proceeding, we consider SPI's petition to stay the effective date of these rules to be moot and no action thereon to be required.

11. Turning back to the question of "identical" and "permissive changes," we wish to make clear at the outset that we cannot in any way mitigate one of our prime responsibilities: namely that which is given to use by Section 302 of the Communications Act of 1934, as amended, to make sure that equipment delivered to the user can reasonably be expected to meet our regulations for the control of radio frequency interference. With respect to radio frequency devices, changes generally can be permitted when identifiable as those which cause little or no effect upon interference. It must be noted, however, that today's proliferation of emitters of electromagnetic energy provides a vastly increased potential for interference in an evnrionment that can be fraught with electromagnetic incompatibilities. Accordingly, we cannot accede to Amana's request to permit marketing prior to the issuance of a grant of type approval in the case of a change.

12. With regard to the above sections of our rules, as referenced in the petitions for reconsideration filed by EIA–LM and Amana, the Commission has no alternative but to require a new application and equipment authorization at any time that a manufacturer chooses to designate equipment with a new model number. However, this does not mean that we will insist on complete retesting. The rules heretofore adopted permit a less detailed application when filing for an authorization of equipment which contains merely variants. The petitioners are referred to Section 2.933(b) of our Rules which enables the time and effort for filing to be vastly reduced in the submission of an application where the identification of the equipment is changed without a change in design, circuitry or construction. Applications in these cases need not be accompanied by a resubmission of equipment for type approval or measurement data customarily required where type acceptance or certification is requested by the applicant.

13. Amana is concerned about the question of fees—namely that whenever there is a change and a new application is filed, the Commission will require a complete retesting and assess the full type ap-

proval fee. This is simply not so. Although we require a new application when a change is made, the applicant is required only to describe the change and pay the fee for a modification of the type approval. Hence the cost to the manufacturer is nominal. When the manufacturer changes the trade name or model number for his own convenience in marketing, as explained in paragraph 12 above, we have no alternative but to require a new application if our records are to be accurate.

14. With respect to Amana's suggestion that we permit changes which are "mechanically identical in all significant respects," we cannot concur. The experience we have accumulated in almost thirty years of type approval testing [8] has shown that while there is good correlation between the test results of some manufacturers and those of our laboratory, the correlation with the test results of other manufacturers has been poor. Since it is manifestly not feasible to authorize some manufacturers to make changes while denying this right to others, we must retain the language that "no change whatsoever" be made in type approved equipment without prior approval from the Commission.[9] It should be understood, of course, that the substitution of an electrically equivalent resistor or capacitor of another make is not considered to be a change within the meaning of Section 2.967(a).

15. With regard to private labeling, the Commission does not agree with the contention of EIA–LM that, by its action in adopting the Report and Order under question, it will preclude or constrain in any way this practice of the industry. On the contrary, in these procedures for equipment authorization, provisions are made and will continue to be made to accommodate the practice of private labeling.

16. The Commission has not been requiring tests on a microwave oven when a change was made only in the interlock to meet the requirements of the Bureau of Radiological Health. On the other hand, several manufacturers have on their own initiative changed model designations to show this redesign. If there is an identification change, an abbreviated application pursuant to Section 2.933 will be required. If the identification remains the same, an application pursuant to Section 2.932 will be required. While the full fee for type approval is required for the equipment with a new identification under the present fee schedule, the fee is nominal if the identification is not changed. With respect to future requirements for type approval of microwave ovens as they may be influenced by future regulations of BRH or the Commission, these would be subject to our rule making proceedings and, accordingly, opportunity for comment will be provided.

17. Sections 2.903, 2.905 and 2.907. The Commission does not agree that the term "identical" should be deleted from the definitions of the equipment authorization procedures but does concur that the permissive changes for type approved, type accepted or certified equipment should be more clearly delineated. Therefore, the above sections have been amended to include references to the appropriate sections which provide the changes authorized by the Commission. In essence, the Commission is of the view that the requirements of an equipment

[8] The rules requiring type approval of medical diathermy equipment were promulgated in 1946.

[9] This language has been in our rules for type approved equipment since they were first adopted in 1946.

authorization program demand that only the kinds of changes specifically delineated can be allowed without further reference to the Commission. Additionally, the permitted variations or changes in type approved, type accepted or certified equipment have been further explained in Sections 2.967, 2.1001 and 2.1043 respectively.

18. Section 2.967(a). *Changes in type approved equipment.* We cannot accept the AHAM proposal to conform Section 2.967(a) to Section 2.1001. It is intentionally more restrictive. Section 2.1001 applies to equipment produced for licensed services and made by manufacturers with relatively high expertise in electronics and interference control. Moreover, such equipment is regularly maintained by highly trained and skilled technicians. Section 2.967, on the other hand, deals largely with devices to be used by the general public, and in particular with microwave ovens—the equipment of concern to Amana and AHAM. Such devices are commonly made by companies or divisions thereof, without a high level of expertise in the control of radio interference, and often with minimal testing facilities. Accordingly, the Commission must reserve the right to determine when a change is significant and when a notification thereof to the Commission is required. The request by Amana and AHAM to conform Section 2.967(a) to Section 2.1001 is therefore denied.

19. Section 2.909. The Commission agrees with EIA–LM with regard to the desirability of revising the requirement for the signature placed upon an application for equipment authorization. The revised Section 2.909, in the appendix herein, permits the requested delegation of the signature authority.

20. Section 2.929. Nonassignability of an equipment authorization. EIA–LM states that the section ". . . would now preclude private labeling unless an entire duplicative type acceptance or type approval filing is submitted". EIA–LM further hypothesizes ". . . if manufacturer A obtains type acceptance and B wishes to market the identical product under its name, B will have to submit the same information which A has already filed with the Commission". Quoting the EIA–LM petition, it further states, "Since there is often a substantial time lag between A's type acceptance authorization and B's decision to market the given product, duplicates will have to be retained indefinitely. Making copies of such material as blueprints and drawings is cumbersome and time consuming. There is no question that B will have to pay the normal filing fee required for type acceptance; thus (EIA–LM) sees no reason why B should not be permitted to file a letter stating that it wishes to market a product identical in every aspect to A's except for the brand name . . .". (EIA–LM filing dated March 19, 1974 at page 10).

21. It would appear that EIA–LM has misconstrued Section 2.929 (b). This section merely states that a grantee cannot assign a grant of an equipment authorization to a second party. Provision is made, however, to license or otherwise authorize a second party to manufacture or market such equipment. Notice of such a licensing agreement must be given to the Commission and we reserve the right to require additional information (such as a new application, new measurement data, etc.) depending on the circumstances in the particular case. Of course, if a change in trade name or model number is made, a new

application must be submitted which in most cases will not require retesting as indicated in Section 2.933.

22. A reading of Section 2.933 which deals with changes in identification of equipment will demonstrate the facility of filing a new application for an equipment authorization when there is a change in the identification of the equipment without a change in design, circuitry or construction. Section 2.933(b) states:

> An application . . . where no change of design, circuitry, or construction is involved need not be accompanied by resubmission of equipment or measurement or test data customarily required with a new application unless specifically requested by the Commission. In lieu thereof, the applicant shall attach a statement setting out:
>
> 1. The original identification used on the equipment prior to the change in identification.
>
> 2. The date of the original grant of the equipment authorization.
>
> 3. The original type approval number assigned by the Commission, if one was assigned.
>
> 4. How the equipment bearing the modified identification differs from the original equipment.
>
> 5. Whether the data previously filed with the Commission (or measured by the Commission in the case of type approved equipment) continues to be representative of and applicable to the equipment bearing the changed identification.
>
> 6. In the case of type accepted equipment, the photographs required by Section 2.983(f).
>
> 7. In the case of certificated equipment, the photographs required by Section 2.1033(c).

23. Section 2.931. *Responsibility of the Grantee.* EIA–LM expresses concern regarding the obligation imposed on a grantee to keep the records required by the Commission when the device in question is actually being manufactured by a second party under a licensing arrangement permitted by Section 2.929(b). The problem posed by EIA–LM envisions the need for costly policing of the details of manufacture by the grantee and extends this concern to the possibility of the need for legal action in the event such records are not made available by the actual manufacturer. In view of this EIA–LM suggests that the provisions of Section 2.931(b) and (c) for record keeping shall apply not only to the grantee but also to the actual manufacturer of equipment produced pursuant to a license, purchase or other contractual agreement. The Commission recognizes the problem presented by EIA–LM. Accordingly, we have deleted the record keeping requirement from Section 2.931 and set it out as a separate regulation, Section 2.938 and made it apply both to the grantee and the manufacturer with a proviso that retention of records by the actual manufacturer will satisfy the grantee's responsibility.

24. Section 2.945. *Sampling tests of equipment compliance.* Arguing against the need for Section 2.945, EIA–LM states that since Section 2.936 appears to provide complete authority to the Commission to inspect the grantee's facilities and the type accepted equipment located there, this rule evidently contemplates inspection of equipment under the control of users. This was not the Commission's intent. We wish to point out, moreover, that there is a distinction between Sections 2.936 and 2.945. Under Section 2.936, the Commission reserves the right to inspect the grantee's facilities or records or to require the submission of equipment to the Commission for testing. Under Section 2.945, we merely announce that we intend to establish a program of spot check-

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ing equipment marketed pursuant to a grant of an equipment authorization to verify that production units continue to comply with our technical specifications. Our intention is to request the grantee to submit equipment for such a determination—not to request same from a user. Section 2.945 has accordingly been revised to clarify this intent.

25. Sections 2.925, 2.969, 2.1003, 2.1045. *Identification and Labeling.* In their petitions, RCA, EIA–CEG and EIA–LM emphasized the problems that could be caused by strict adherance to the nameplate identification data required by Sections 2.925, 2.969, 2.1003, and 2.1045. The petitioners contend that to meet the requirements embodied in these regulations on March 25, 1974 when these rules were to become effective, imposes a hardship to the point of possible production shutdown because of the need to redesign and retool.[10] EIA–LM points out difficulties including a loss to the manufacturer's investment for the labeling machinery presently used and in stocks of basic label blanks on hand. RCA requests a postponement or waiver until July 1, 1975 of the effective date of identification of equipment requirements set forth in these sections; EIA–LM—until September 1, 1975. In response to this argument, the Commission has revised these regulations to indicate that it will accept alternative methods of designating the model number until September 1, 1975, provided it finds the name and model number of each unit to be clearly identifiable, separate and distinct from any other number or designation.

26. Section 2.963. *Application for Type Approval.* AHAM requests the Commission to permit the filing of a single application for type approval which details the variations from a basic equipment. The Commission has had experience with applications of this nature and has found such applications to be unsatisfactory and involve a great amount of extra work by the Commission, and to yield results of questionable accuracy. It is easier, and definitely more accurate, for the manufacturer to detail the variations and list them separately than for the Commission to attempt to cull these from the applications. AHAM request is therefore denied. AHAM's argument that separate applications will be excessively costly has been disposed of in paragraph 13 above.

27. Sections 2.963(d)(8) and 2.983(d)(8). *Submission of Instruction Books.* EIA–LM requests that instruction books, when not available at the time of filing for type acceptance, be filed at such time as they become available, or such later date as may be specified, instead of at the time stipulated by the Commission: 60 days after grant of type acceptance or such later date as may be specified. The Commission acknowledges this problem and has revised these regulations to delete the requirement for filing the instruction book within 60 days, and in general to allow the instruction book to be submitted as soon as it is available.

28. Section 2.1033(c). *Photograph for Certification.* EIA–CEG requests that the requirement for an 8″ by 10″ photograph be changed to a photograph with the required detail mounted on an 8″ by 10″

[10] To avoid this problem, the Commission stayed these regulations until June 25, 1974, pending reconsideration of the requirement for identification and labeling.

paperboard for ease in filing. The Commission agrees and has revised this section accordingly.

29. Additionally, Section 0.457(d) is corrected to include subsection (1)(iv) which was inadverently deleted in the Report and Order.

30. Accordingly, IT IS ORDERED effective August 2, 1974, that Parts 0 and 2 of the FCC Rules are revised as set forth in the attached Appendix. Authority for these revisions is contained in Section 4(i), 302 and 303(r) of the Communications Act of 1934, as amended. Because the amendment is procedural in nature, the prior notice and effective date provisions of 5 U.S.C. 553 are inapplicable.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 0 is revised as follows:

In Section 0.457(d)(1) a new subparagraph (iv) is added to read as follows:

0.457 RECORDS NOT ROUTINELY AVAILABLE FOR PUBLIC INSPECTION.

* * * * * * *

(d) * * *

(1) * * *

(iv) Annual fee computation forms submitted for cable television systems pursuant to Section 76.406 of this chapter.

Part 2 is revised as follows:

1. In Section 2.903, paragraph (b) is amended to read as follows:

2.903 TYPE APPROVAL.

* * * * * * *

(b) Type approval attaches to all units subsequently marketed by the grantee which are identical (See § 2.908) in all respects to the sample tested by the Commission or include only changes authorized by the Commission pursuant to § 2.967.

2. In Section 2.905, paragraph (b) is amended to read as follows:

2.905 TYPE ACCEPTANCE.

* * * * * * *

(b) Type acceptance attaches to all units subsequently marketed by the grantee which are identical (See § 2.908) to the sample tested except for permissive changes or other variations authorized by the Commission pursuant to § 2.1001.

3. In Section 2.907, paragraph (b) is amended to read as follows:

2.907 CERTIFICATION.

* * * * * * *

(b) Certification attaches to all units subsequently marketed by the grantee which are identical (See § 2.908) to the sample tested except for permissive changes or other variations authorized by the Commission pursuant to § 2.1043.

4. In paragraph (c) of Section 2.909, the proviso is amended. As revised Section 2.909(c) reads as follows:

2.909 WRITTEN APPLICATION REQUIRED.

* * * * * * *

(c) Each application including amendments thereto, and related statements of fact required by the Commission, shall be personally signed by the applicant if the applicant is an individual; by one of the partners if the applicant is a partnership; by an officer, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association: *Provided, however,* that the application may be signed by the applicant's authorized representative who shall indicate his title, such as plant manager, project engineer, etc.

§ 2.931 [AMENDED].

5. In Section 2.931, paragraph (b) and (c) are deleted.
6. A new Section 2.938 is inserted to read as follows:

2.938 RETENTION OF RECORDS.

(a) For each equipment for which an equipment authorization has been issued, the grantee shall maintain the records listed below:

(1) A record of the original design drawings and specifications and all changes that have been made that may affect compliance with the requirements of Section 2.931.

(2) A record of the procedures used for production inspection and testing to insure the conformance required by Section 2.931.

(b) The provisions of paragraph (a) of this section shall also apply to a manufacturer of equipment produced under an FCC equipment authorization pursuant to a license, purchase or other contractural agreement between said manufacturer and the grantee of the equipment authorization. Retention of records by said manufacturer in these circumstances shall satisfy the grantee's responsibility under paragraph (a) of this section.

(c) The records listed in paragraph (a) of this section shall be retained for one year after the manufacture of said equipment item has been permanently discontinued, or until the conclusion of an investigation or a proceeding if the grantee (or under paragraph (b) of this section the manufacturer) is officially notified that an investigation or any other administrative proceeding involving his equipment has been instituted.

(d) The records required to be retained by paragraph (a) of this section shall apply only to equipment for which the equipment authorization was issued on or after Sept. 1, 1974 or for which the license, purchase or other contractual agreement in paragraph (b) of this section was signed on or after Sept. 1, 1974.

7. Section 2.945 is revised to read as follows:

2.945 SAMPLING TESTS OF EQUIPMENT COMPLIANCE.

The Commission will, from time to time, request the grantee to submit various equipment(s) for which an equipment authorization(s) has been granted, to determine the extent to which subsequent production of such equipment continues to comply with the data filed by the applicant (or measured by the Commission in the case of type approved equipment). Shipping costs to the Commission's laboratory and return shall be borne by the grantee.

8. Section 2.963(d)(8) is revised to read:

2.963 APPLICATION FOR TYPE APPROVAL.

* * * * * * *

(d) * * *

(8) Instruction books. If the instruction book(s) is not available when the application is filed a set of draft instructions should be provided and the complete instruction book should be submitted as soon as available.

* * * * * * *

9. Section 2.967 is amended to add a note after paragraph (a) to read as follows:

2.967 CHANGES IN TYPE APPROVED EQUIPMENT.

(a) No mechanical or electrical change whatsoever may be made in a type approved equipment without prior approval by the Commission.

NOTE: Changes only in color of finish, or use of technically equivalent noncritical parts of different manufacture are not considered to be changes within the intent of this section. However, changes in make of critical parts (such as magnetrons) or type of semiconductors or vacuum tubes are considered to be changes requiring approval. In this context the term critical changes means those changes that affect the capability of the device to comply with the technical standards of the Rules. Any questions as to whether changes require approval or not should be referred to the Laboratory Division for determination.

* * * * * * *

10. Section 2.969 headnote is amended, paragraph (d) is amended and a new paragraph (e) is added.

2.969 IDENTIFICATION LABEL FOR TYPE APPROVED EQUIPMENT.

* * * * * * *

(d) Any other statement or labeling requirement imposed by the rules governing the operation of this equipment, except that statements of compliance with equipment approval rules or technical standards may appear in a clear and recognizable manner elsewhere on the equipment.

(e) For applications filed prior to September 1, 1975, the Commission will accept, for type approval, alternative methods of identification, other than that specified in paragraph (a), (b) and (c) of this section, provided it finds the name pursuant to paragraph (a) of this section and the number of each unit pursuant to paragraph (b) of this section to be clearly identifiable, separate and distinct from any other number or designation on the equipment.

11. In Section 2.983, subparagraph (8) of paragraph (d) is amended to read as follows:

2.983 APPLICATION FOR TYPE ACCEPTANCE.

* * * * * * *

(d) * * *

(8) Instruction book(s). If the instruction book is not available when the application is filed, a set of draft instructions should be provided and the complete instruction book should be submitted as soon as available. The Commission may specify a date when the complete instruction book should be submitted to conform this requirement with the regulations of the service under which type acceptance is requested.

* * * * * * *

12. Section 2.1001, headnote is amended, and paragraph (a) is amended to read as follows:

2.1001 VARIATION OR CHANGES IN TYPE ACCEPTED EQUIPMENT.

(a) Equipment of the same type is defined for purposes of type acceptance as being equipment which is electrically and mechanically interchangeable and in addition will have the same basic tube or semiconductor line up, frequency multiplication, basic frequency determining and stabilizing circuitry, basic modulator circuit and maximum power rating. Variations in electrical and mechanical construction, other than the items indicated above are permitted provided the variation or change is made in compliance with the requirements of paragraphs (b), (c) and (d) of this section.

* * * * * * *

13. Section 2.1003 and headnote are amended to read as follows:

2.1003 IDENTIFICATION LABEL FOR TYPE ACCEPTED EQUIPMENT.

In the case of an equipment that has been type accepted, the identification label required by Section 2.925 shall contain the following:

(a) Name of the grantee of the type acceptance.

(b) The words "FCC TRANSMITTER DATA" followed by the number assigned to the equipment by the grantee. The abbreviations "XMTR" or "TX" may be used in place of the word "TRANSMITTER".

NOTE: If the equipment is a transceiver having transmitting and receiving capability and a single identifier is assigned, the words "FCC DATA", followed by the number assigned to the equipment by the grantee shall be used. If the transmitter part and the receiver part are assigned separate identifiers, the marking of paragraph (b) shall be used for the transmitter part and the marking of Section 2.1045(b)(2) shall be used for the receiver part if the receiver part is subject to the requirement for certification.

(c) Any other statement or labeling requirement imposed by the rules governing the operation of this equipment, except that statements of compliance with equipment approval rules or technical standards may be permitted to appear in a clear and recognizable manner elsewhere on the equipment.

(d) For applications filed prior to September 1, 1975, the Commission will accept, for type acceptance, alternative methods of identification, other than

that specified in paragraph (b) of this section, provided it finds the name pursuant to paragraph (a) of this section and the type number of each unit to be clearly identifiable, separate and distinct from any other number or designator on the equipment.

14. In Section 2.1033, paragraph (c) is amended to read as follows:

2.1033 APPLICATION FOR CERTIFICATION UNDER PART 15.

* * * * * * *

(c) The application shall be accompanied by a photograph showing the general appearance of the equipment and the operating controls available to the user. The photograph shall be 8" by 10" in size, or mounted on paper 8" by 10" to 8½ by 11 in size. If the identification label does not appear on this photograph or is too small to be read, a second photograph shall be attached showing the identification label in sufficient detail so that the name and number can be read. In lieu of the second photograph, a sample label, or a facsimile thereof, mounted on a full size sheet, and a sketch showing where this label will be placed on the equipment, may be submitted.

15. Section 2.1043 and headnote are amended to read as follows:

2.1043 VARIATIONS OR CHANGES IN CERTIFICATED EQUIPMENT.

(a) Variations in the electrical and mechanical construction of equipment requiring an application for, and grant of, certification are permissible providing that the variations, either do not affect the characteristics required to be reported to the Commission, or provided the variations or changes are made in compliance with paragraphs (b), (c) or (d) of this section.

(b) Two classes of permissive changes may be made in certificated equipment without requiring a new application for and grant of certification. Neither class of change shall result in a change in name or model number.

(1) A Class I permissive change includes those modifications in the equipment which do not degrade the characteristics reported by the manufacturer and accepted by the Commission when certification is granted. No filing with the Commission is required for a Class I permissive change.

(2) A Class II permissive change includes those modifications which degrade the performance characteristics as reported to the Commission at the time of the initial certification. Such degraded performance must still meet the minimum requirements of the applicable rules. When a Class II permissive change is made by the grantee, he shall supply the Commission with complete information and the results of tests of the characteristics affected by such change. The modified equipment shall not be marketed under the existing grant of certification prior to acknowledgement by the Commission that the change is acceptable.

(c) A grantee desiring to make a change other than a permissive change described in paragraph (b) of this section, shall file an application on Form 722 accompanied by the required fees. The grantee shall attach a description of the change(s) to be made and a statement indicating whether the change(s) will be made in all units (including previous production) or will be made only in those units produced after the change is authorized.

(d) A change which results in a new name and/or model number (with or without change in circuitry) requires a new application for, and grant of, certification. If the change affects the characteristics required to be reported, a complete application shall be filed. If the characteristics required to be reported are not changed the abbreviated procedure of Section 2.1035 may be used.

16. Section 2.1045 and headnote are amended to read as follows:

2.1045 IDENTIFICATION LABEL FOR CERTIFICATED EQUIPMENT.

In the case of an equipment that has been certificated, the identification label shall contain at least the following:

(a) The trade name. The trade name, if shown elsewhere on the equipment, shall be the same as that shown on the label.

(b) For consumer equipment (i.e. broadcast receivers, Part 15 walkie talkies, and other equipment sold to the general public) the words "MODEL NO." followed by the number assigned to the equipment by the grantee. If the identification label contains other numbers in addition to that required by this paragraph, such as "SERVICE NO.", "CATALOG NO." or other similar terms to avoid confusion with the identifier required by the Commission, the words

"MODEL NO." may be preceded by the term "FCC DATA" to facilitate recognition of the identifying number used for FCC.

(c) For communications equipment (i.e. receivers and other equipment normally used a licensed stations) the words "FCC RECEIVER DATA" followed by the number assigned to the equipment by the grantee. The abbreviations "RCVR" or "RX" may be used in lieu of the word "RECEIVER".

NOTE: If the equipment is a transceiver having transmitting and receiving capability and a single identifier is assigned the marking of Section 2.1003(b) shall be used. If the transmitter part and the receiver part are assigned separate identifiers, the marking of Section 2.1003(b) shall be used for the transmitter part, and the making of Section 2.1045 (b) or (c) shall be used for the receiver part.

(d) Any other statement or labeling requirement imposed by the rules governing the operation of this equipment, except that statements of compliance with equipment approval rules or technical standards may appear in a clear and recognizable manner elsewhere on the equipment.

(e) For applications filed prior to September 1, 1975, the Commission will accept, for certification, alternative methods of identification, other than those specified in paragraphs (a), (b) and (c) of this section, provided it finds the name pursuant to paragraph (a) of this section and the number of each unit pursuant to paragraph (b) or (c) of this section, to be clearly identifiable, separate and distinct from any other number or designator on the equipment.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
TERENCE FAULKNER, SAN FRANCISCO, CALIF.
Concerning Section 315, Political Broadcast by Stations KRON–TV, KPIX–TV, KGO–TV, and KQED–TV, San Francisco, Calif.

JULY 24, 1974.

Mr. TERENCE FAULKNER,
2371 42nd Avenue,
San Francisco, Calif.

DEAR MR. FAULKNER: This is in reference to your letter to the Commission dated June 30, 1974. You stated that you are the Republican candidate for the California State Assembly from the 18th Assembly District; that your only opponent is Democratic Assemblyman Leo McCarthy; that in June Mr. McCarthy "was a candidate for the recently vacated office of Speaker of the California State Assembly" and he was eventually elected to that position; that "[d]uring a period of about two weeks Mr. McCarthy was interviewed numerous times and received other extensive news coverage on" KRON–TV, KPIX(TV), KGO–TV, and KQED(TV) all of San Francisco, California; and that all four stations have refused to afford you equal time because of their position that "the interviews and other related items were all presented to the public during news broadcasts".

We are enclosing for your information copies of the Commission's Public Notices of August 7, 1970 and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office." These documents contain the provisions of Section 315 of the Communications Act, amendments enacted by the Congress, the Commission's rules, regulations and guidelines promulgated thereunder, and representative rulings and interpretations. This material should serve to inform you, generally, as to the applicability and requisites of Section 315 in given situations.

As you are aware, if a licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in the use of such broadcasting station. If a legally qualified candidate appears on a bona fide newscast, bona fide news interview, bona fide documentary, or on-the-spot coverage of a bona fide news event, such an appearance will not be deemed a use of a broadcasting station for purposes of Section 315.

These "bona fide news" exceptions were enacted by Congress in order to enable broadcasters to carry news concerning candidates and/

or events in which candidates are involved. Congress' wording of Section 315(a)(1) exempting bona fide newscasts from the equal opportunities requirement is explicit and the Commission is bound thereby. Therefore it appears that under the circumstances described in your letter you would not be entitled to equal opportunities under Section 315.

The same amendment that added the "bona fide news" exceptions to Section 315 reaffirmed the application of the fairness doctrine to appearances by candidates on exempted news programs.

Under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it must afford reasonable opportunity for the presentation of contrasting views. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourge and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

The Commission has stated that "the primary issue presented to the voters in an election is who among all the candidates should be elected," *In re Complaint of Dr. Benjamin Spock*, 44 FCC 2d 12 (1973). However, from the information provided in your letter it appears that the issue in connection with which Mr. McCarthy appeared was Mr. McCarthy's campaign for Speaker of the California State Assembly. Assuming that this is a controversial issue of public importance, you have not shown that any of the licensees about whom you complain have failed to afford a reasonable opportunity in their overall programming for the presentation of contrasting views.

In view of the above, no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
SIDNEY GLICK, EL CENTRO, CALIF.
Concerning Section 315 Political Broadcast Re Station KECC–TV

JULY 18, 1974.

SIDNEY GLICK, Esq.,
895 Broadway, Suite 103,
El Centro, Calif.

DEAR MR. GLICK: This is in response to your letter of complaint of May 16, 1974 concerning station KECC–TV, El Centro, California.

In particular, you stated that you are a candidate for District Attorney of Imperial County; that KECC–TV interviewed one of the other candidates for District Attorney for approximately five minutes; and that you were told that the candidate was only standing in for someone else.

In a letter dated May 30, 1974 addressed to our FCC Field Engineering Office, District #11, received in this office on June 24, 1974, a copy of which is attached, KECC–TV stated that it had informed you that there had been no "use" of its facility by any candidate to require equal opportunities under Section 315 of the Communications Act: that the Assistant District Attorney of Imperial County appeared on KECC–TV on its regularly scheduled evening news program concerning the operation of the District Attorney's Office; that a transcript of the interview provided by licensee revealed that the Assistant District Attorney discussed the implementation, with the aid of a federal grant, of a continuing education program for the numerous law enforcement agencies in the Imperial Valley; that that appearance was exempted from the equal opportunities provisions of Section 315 as part of a regular news program; that Section 73.657(e) of the Commission Rules requires that requests for equal opportunities must be submitted to the licensee within one week of the day of the first "use"; that your request was not made until three weeks after the first "use"; and that KECC–TV had arranged for an 8½ minute appearance by each candidate for Imperial County District Attorney, including you, at no cost to the candidate.

Section 315(a) of the Communications Act states in part:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . .
>
> * * * * * * *

> Appearance by a legally qualified candidate on any—(1) bona fide newscast . . . shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

Section 73.657(d) of the Commission Rules states in part:

> A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use, giving rise to the right to equal opportunities, occurred . . .

It appears from the information before the Commission that Mr. Chaille's appearance on KECC–TV was made during a bona fide news program exempt from the "equal opportunities" provision of Section 315. Moreover, even if this appearance were not exempt, it further appears that your request for equal opportunities was not made to KECC–TV until April 27, 1974, three weeks after the "first prior use".

Under these circumstances no further Commission action appears warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors waranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
THOMAS W. FLYNN, NILES, ILL.
Concerning Political Broadcast, Section 315, Re WLS–TV, Chicago, Ill.

JULY 19, 1974.

THOMAS W. FLYNN, Esq.,
8223 North Oconto,
Niles, Ill.

DEAR MR. FLYNN: This is in reference to your letter of June 20, 1974. You state that you are the Democratic candidate for State Representative from the 4th Illinois Legislative District; that on June 14, 1974 Representative Eugene Schlickman, one of your opponents for that office, was interviewed on the "ABC–TV 6 PM news" regarding an Illinois court decision on the unconstitutionality of Illinois' Regional Transportation Authority; that the "court decision is of no present legislative concern"; that the interviewer "asked several questions entirely removed from the subject matter of the court decision"; that in your opinion Representative Schlickman "was given a five minute opportunity to campaign for re-election on Channel 7 ABC–TV"; and that you immediately wrote to the station requesting "equal time", but your request was refused.

Enclosed in your letter to the Commission was a copy of a letter dated June 17, 1974 from you to ABC Television, Chicago, Illinois, requesting "equal time," and a letter dated June 18, 1974 from Mr. John Mies, news director of WLS–TV, Chicago, Illinois, which stated that the appearance by Representative Schlickman on the news program which you site "was part of . . . [WLS–TV's] coverage and report on a breaking news story of that day" and that "[e]qual time does not apply to news stories or news programs."

We are enclosing for your information copies of the Commission's Public Notices of August 7, 1970 and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office." These documents contain the provisions of Section 315 of the Communications Act, amendments enacted by the Congress, the Commission's rules, regulations and guidelines promulgated thereunder, and representative rulings and interpretations. This material should serve to inform you, generally, as to the applicability and requisites of Section 315 in given situations.

As you are aware, if a licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in the use of such broadcasting station. If a legally qualified

candidate appears on a bona fide newscast, bona fide news interview, bona fide documentary, or on-the-spot coverage of a bona fide news event, such an appearance will not be deemed a use of a broadcasting station for purposes of Section 315.

It appears from the information in your letter that the appearance by Representative Schlickman on WLS–TV was part of a bona fide newscast within the meaning of the exception of Section 315(a)(1) and therefore would not be subject to the equal opportunities requirement. Therefore no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
MISSISSIPPI REPUBLICAN PARTY, JACKSON, MISS.
For Section 315, Political Broadcast, Ruling

JULY 23, 1974.

MR. HALEY BARBOUR,
Executive Director, Mississippi Republican Party, Post Office Box 1178, Jackson, Miss.

DEAR MR. BARBOUR: This is in reference to your letter of July 11, 1974 to the Clerk of the United States House of Representatives, which was referred to this office for reply on July 16.

You state that on Saturday, August 3, the Vice President of the United States will be speaking at the Golden Triangle Regional Airport, which is located in northeast Mississippi between the cities of Columbus and Starkville; that the purpose of the Vice President's trip is political; that "this will mark the first visit ever by a Vice President to the northeastern section of the state"; and that you "have been asked by some radio station people in the area if his visit can be broadcast by [a regional] network of radio stations on a public service basis", and if so whether there can be "commercial sponsors who would sponsor the broadcast in exactly the same way as they sponsor college or high school football games." You also state that it is anticipated that the Vice President will endorse the candidacy of a Republican candidate for Congress during this address, and you ask if the sponsorship of the Vice President's speech would constitute a contribution to the campaign of any candidates for federal elective office whom he might endorse.

In a telephone conversation of July 17, 1974 with a member of the Complaints and Compliance Division's staff, you further stated that the commercial advertisers would sponsor the program because it features a speech by the Vice President and not because he would endorse any political candidate. You also indicate that it was your understanding that commercial announcements probably will precede and follow the Vice President's speech and that the program may be introduced with language to the effect that "the following broadcast of the Vice President's visit is brought to you as a public service by Sponsors X, Y, Z, etc."

Since the Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, it does not direct licensees in their selection of programs. Accordingly the decision to broadcast the Vice President's speech is that of each licensee.

Section 315(c) of the Communications Act of 1934, as amended, provides: (c) No station licensee may make any charge for the use of such station by or on behalf of any legally qualified candidate for Federal elective office (or for nomination to such office) unless such candidate (or a person specifically authorized by such candidate in writing to do so) certified to such licensee in writing that the payment of such charge will not violate any limitation specified in paragraph (1), (2), or (3) of section 104(a) of the Campaign Communications Reform Act, whichever paragraph is applicable.

You state that in the present case, advertisers would sponsor the broadcast in order to sell their products on a program featuring the Vice President, not because of the Vice President's anticipated endorsement of any candidate and not for the purpose of advancing the candidacy of a candidate. Nevertheless, we believe that purchases of time for the Vice President's speech in the circumstances here would constitute expenditures on behalf of the candidate or candidates endorsed by the Vice President, and that if candidates for Federal elective office are endorsed during the broadcast, the licensees carrying the sponsored program could not make any charge therefore unless the candidates (or persons specifically authorized by them to do so) certified to the licensees that the payment of such charges would not violate any limitation specified in Section 104(a) of the Campaign Communications Reform Act. To rule otherwise would place this Commission in the untenable position of attempting to determine the motives of persons who sponsor programs on which candidates for Federal elective office are endorsed, and which programs therefore are on behalf of their candidacies. In so ruling, we take note of your statement that "it is anticipated that the Vice President will endorse the candidacy of a Republican candidate for Congress during this address."

You have also asked whether "the sums . . . expended [by the sponsor]" would be "contributions to . . . [a] campaign," and if such "sponsors are corporations, in what position does that put [them] in regard to federal law?" You apparently have reference to Federal laws relating to contribution by corporation to political candidates. Enforcement of such laws is within the jurisdiction of the Justice Department and thus it would be inappropriate for the Commission to comment on the above question.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

FCC 74-738

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SEE MOR CABLE TV OF BERNIE, INC., BERNIE, Mo. For Certificate of Compliance	CAC–3148 M0095

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 19, 1974)

BY THE COMMISSION:

1. On October 15, 1973, See Mor Cable TV of Bernie, Inc. filed the above-captioned application for certificate of compliance to begin cable television service at Bernie, Missouri, located within the Poplar Bluff, Missouri, smaller television market. See Mor proposes to carry the following television broadcast signals on its 20 channel cable television system at Bernie:[1]

KFVS–TV (CBS, Channel 12) Cape Girardeau, Missouri
WSIL–TV (ABC, Channel 3) Harrisburg, Illinois
WPSD–TV (NBC, Channel 6) Paducah, Kentucky
WDXR–TV (Ind., Channel 29) Paducah, Kentucky
WKMU (Educ., Channel 21) Murray, Kentucky
KPOB–TV (ABC, Channel 15) Poplar Bluff, Missouri

The application is opposed by Turner-Farrar Association, licensee of Station KPOB–TV, Poplar Bluff, Missouri.

2. Turner objects to applicant's claim that, since Bernie is located within the specified zone of satellite Station KPOB–TV, Bernie is thus located within the second fifty market of this satellite's master Station WSIL–TV[2] and may, pursuant to Section 76.63, carry all stations licensed to other designated communities in that market. Turner supports its objection to applicant's claim by urging the Commission to reaffirm its finding in *Midwest Video Corporation*[3], FCC 73–377, 40 FCC 2d 441, 443 (1973) that the Commission views satellite stations on an equal footing with other television broadcast stations, and such satellites shall be considered as constituting separate television markets with their own specified zones.

3. Turner's argument concerning the separate market status of satellite stations is well taken. It follows that applicant's signal carriage entitlement must be gauged by the requirements of Section 76.59 of the Commission's Rules, which governs the signal carriage of cable television systems located within a smaller television market. Accord-

[1] The population of Bernie is 1,641.
[2] Cape Girardeau, Misssouri-Paducah, Kentucky-Harrisburg, Illinois, major television market #69.
[3] That case involved the same satellite Station KPOB–TV and a similar objection by Turner-Farrar.

ingly, since under that rule applicant is entitled to a signal carriage complement of a full network affiliate of each of the major national networks and achieves its ABC quota with the carriage of Station KPOB–TV, it is not entitled to carry the signal of ABC distant network Station WSIL–TV.

4. Though the point has not been raised by the pleadings, we note that applicant's franchise fails to strictly comply in the following respects with Section 76.31 of the Commission's Rules:[4] The franchise contains no statement that it was granted after a full public proceeding affording due process at which applicant's legal, character, financial, technical and other qualifications as well as the adequacy and feasibility of its construction arrangements were considered; (2) the franchise does not require that subscriber rates may be increased only by authorization of the franchising authority after an appropriate public proceeding affording due process; (3) the franchise neither specifies subscriber complaint procedures nor requires the maintenance of a local business office for the purpose of receiving and resolving such complaints; (4) the franchise does not require that amendments to our Rules be incorporated therein within one (1) year of adoption thereof, or at the time of franchise renewal, whichever occurs first. Additionally, Section 22 of the franchise does not appear to be consistent with Section 76.31(b) of the Commission's Rules because it provides for a franchise fee in terms of "annual gross service charge paid by the users" instead of as a percentage of gross subscriber revenues.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would not be consistent with the public interest. Accordingly, we will deny See Mor's present application without prejudice to its filing an amended application that is consistent with the requirements of Sections 76.31 and 76.59 of the Rules.

Accordingly, IT IS ORDERED, That the "Objections of Station KPOB–TV" ARE GRANTED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance," filed by See Mor Cable TV of Bernie, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[4] See Mor received its franchise July 2, 1973.

109–004—74——17

FCC 74-745

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SONIC TV SYSTEMS, LTD., HIGHLAND FALLS, N.Y. For Certificate of Compliance	CAC-2289 (NY361)

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 19, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. On March 28, 1973, Sonic TV Systems, Ltd., filed an application for certificate of compliance to begin cable television service at Highland Falls, New York, a community located within the New York, New York-Linden-Paterson, New Jersey major television market (#1).[1] The system proposes to offer its subscribers the following television broadcast signals:

WCBS-TV (CBS, Channel 2) New York, New York
WNBC-TV (NBC, Channel 4) New York, New York
WNEW-TV (Ind., Channel 5) New York, New York
WABC-TV (ABC, Channel 7) New York, New York
WOR-TV (Ind., Channel 9) New York, New York
WPIX (Ind., Channel 11) New York, New York
WNYE-TV (Educ., Channel 25) New York, New York
WNYC-TV (Ind., Channel 31) New York, New York
WNET (Educ., Channel 13) Newark, New Jersey
WNJU-TV (Foreign Language, Channel 47) Linden, New Jersey
WXTV (Foreign Language, Channel 41) Paterson, New Jersey
WHCT-TV (Ind., Channel 18) Hartford, Connecticut
WSMW-TV (Ind., Channel 27) Worcester, Massachusetts

Carriage of these signals is consistent with Section 76.61 of the Commission's Rules, and the application is unopposed.

2. Section 76.251(a)(2) of the rules requires that cable systems operating within major television markets be capable of providing one channel suitable for transmission of Class II or Class III signals for each Class I channel utilized. Section 76.251(a)(2) would require Sonic to offer 13 Class II or III channels, six more than are planned. On March 6, 1974, Sonic amended its application to request a waiver of Section 76.251(a)(2) of the Rules. Sonic believes that under the circumstances this limited waiver would be appropriate. Sonic states that with its proposed channel capacity it will have seven channels available for non-broadcast use, and even after four channels are used

[1] Highland Falls has a population of approximately 4,600 people. Sonic proposes to provide its subscribers with a 20 channel system.

to fulfill the various access requirements, there will be a "surplus" of three channels. In light of the small size of the community to be served, Sonic is confident that it will be able to meet all foreseeable access demands with its proposed system. Sonic further alleges that with a population of approximately 4,600 people, it cannot realistically expect more than 1,000 subscribers. It is argued that in an area the size of Highland Falls, the construction of a 26-channel system would be prohibitively expensive.

3. It appears that in light of the size of Highland Falls and the number of potential subscribers, Sonic's proposal for a system with a twenty channel capacity is reasonable, and appears capable of serving the needs of the community. We are satisfied with Sonic's allocation of its channels to fulfill our minimum access requirements. However, should sufficient demand develop, we expect Sonic to make additional channels available. This waiver will extend only to March 31, 1977. When Sonic applies for recertification, we will expect it to show the degree to which its proposal has been successful and has operated in the public interest. *See, Eastern Connecticut Cable Television, Inc.*, FCC 74–100, 45 FCC 2d 137 (1974).

4. We note, *sua sponte*, that Sonic's franchise is not in strict compliance with Section 76.31 of the Rules. However, we find Sonic's franchise, granted August 4, 1971, to be in substantial compliance as follows: 1) the franchise requires Sonic to make services available within 12 months from the date on which construction begins. In addition, Sonic advises the Commission that it will complete construction during the first year following the grant of its certificate; 2) the term of the franchise is twenty five years; 3) the franchising authority has specified the initial subscriber installation and monthly service rates. Although not expressly recited in the franchise, Sonic submits that it will not raise its rates without prior approval of the City of Highland Falls, pursuant to a full and open proceeding affording due process; 4) the applicant must pay a franchise fee of 3% of the gross monthly rental fee received from subscribers; and 5) Sonic commits itself to maintaining an office in or near Highland Falls, and will have available a telephone number to take any service or related complaints. Accordingly, we will certify the application until March 31, 1977 *CATV of Rockford*, Inc., FCC 72–1105 38 FCC 2d 10(1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973).

In view of the foregoing, the Commission finds that a grant of the above captioned application and partial waiver of Section 76.251 of the Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" filed March 28, 1973, by Sonic TV Systems, Ltd. IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

109-004—74——18

FCC 74-768

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2, 89, 91, AND 93 OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE FOR THE SHARED USE OF CERTAIN FREQUENCIES BY THE SPECIAL INDUSTRIAL RADIO SERVICE IN PUERTO RICO AND THE VIRGIN ISLANDS	Docket No. 20042 RM-2139

REPORT AND ORDER

(Adopted July 16, 1974; Released July 25, 1974)

(Proceeding Terminated)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. On April 30, 1974, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in the above-entitled matter which was published in the Federal Register on May 3, 1974. The Notice proposed to amend Sections 2.106, 89.459, 91.504 and 93.352 of the rules to permit persons located in Puerto Rico and the Virgin Islands, and eligible in the Special Industrial Radio Service, to share frequencies now available to the Forestry-Conservation and Railroad Radio Services.[1] The Notice of Inquiry stated that the Commission wished to take comprehensive action in this matter and asked for additional comments on 1) whether other radio services had a similar need in Puerto Rico and the Virgin Islands to share these Forestry Conservation and Railroad frequencies and 2) what, if any, difficulties such interservice sharing might entail.

2. The Commission proposed the interservice sharing of these frequencies[2] because it felt that unused frequencies should not be permitted to continue lying fallow when licensees in other services have demonstrated a need for such frequencies.

3. Comments were received from the Puerto Rico Department of Natural Resources, the Special Industrial Radio Service Association, Inc., the Forestry-Conservation Communications Association and the Association of American Railroads. No reply comments were received. All comments submitted have been carefully considered, and will be discussed herein.

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[1] Railroad Radio Service: 160.410, 160.425, 160.440, 160.455, 160.470, 160.485, 160.500, 160.515, 160.530, 160.545, 160.560, 160.575, 160.590, 160.605, and 160.620.
Forestry-Conservation Radio Service: 159.225, 159.240, 159.255, 159.270, 159.285, 159.300, 159.315, 159.330, 159.345, 159.360, 159.375, 159.390, 159.405, 159.420, 159.435.

[2] None of the seventeen 159 MHz band frequencies presently allocated to the Forestry-Conservation Radio Service in Puerto Rico and the Virgin Islands are in use. Only three of the forty-three VHF channels available to Railroad Radio Service eligibles on these islands are in use.

4. The basic objective of the proposed rule amendment—utilization of fallow frequencies—was unanimously supported by the comments. The view of the Association of American Railroads was typical:

> This Association has no objection to the regulatory amendments proposed by the Commission and supported by the Special Industrial Radio Service Association. . . . Because of the remoteness of these land areas from the continental United States, AAR's members do not foresee that such a reassignment would cause interference with U.S. Railroad operations.

The Puerto Rico Department of Natural Resources, however, while agreeing in principle that use of these frequencies should be examined and that they should be made available to other types of radio users, requested that at least one of the Forestry-Conservation radio frequencies be reserved because it anticipates establishing a radio network to link its headquarters, regional offices, and field units.

5. We are also removing 160.620 MHz from the list of frequencies proposed because of its proximity to 160.625 MHz, a frequency assigned to the maritime mobile services. Without close coordination between the use of the maritime mobile frequency and the use of 160.620 MHz, there is a potential danger of serious interference and the Commission feels it would be better to delete the frequency from the original proposal.

6. The Association of American Railroads requested that it be relieved of the frequency coordination responsibility for any railroad channels which are transferred to non-railroad users in these two territories. The Commission's Notice stated that, "all applications for the assignment of a new frequency, or to change existing facilities in such a manner as to require frequency coordination, as specified in Section 91.8(a) hereof, shall be accompanied by evidence of frequency coordination with the sharing service." We anticipate that the actual coordination will be done by the Special Industrial Radio Service Association and, therefore, the Association of American Railroads will not have primary frequency coordination responsibility.

7. Since no other services indicated a need to share these Forestry-Conservation and Railroad frequencies in Puerto Rico and the Virgin Islands, we are only making them available for shared use by the Special Industrial Radio Service.

8. In view of the foregoing, the Commission concludes that the Public interest will be served by amending the rules to provide for the shared use of these frequencies by Special Industrial Radio Service eligibles in Puerto Rico and the Virgin Islands.

9. Accordingly, IT IS ORDERED, pursuant to the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, that Parts 2, 89, 91, and 93 of the Commission's Rules are amended effective August 30, 1974, as set forth in the attached Appendix.

10. It is further ordered, That the proceedings in Docket No. 20042 are hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Parts 2, 89, 91, and 93 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

A. Section 2.106, the Table of Frequency Allocations, is amended in columns 7 through 11 for the bands 158.715–159.48 MHz and 159.48–161.575 MHz by adding footnote designator NG 70 and will read as follows:

§ 2.106 TABLE OF FREQUENCY ALLOCATIONS.

Band (MHz)	Service	Class of station	Frequency (MHz)	Nature of service of station
7	8	9	10	11
*	*	*	*	*
158.715–159.48	Land mobile.....	Base land mobile.....		Public safety (NG 70).
159.48–161.575	do.....	do.....		Land transportation (NG6) (NG26) (NG28) (NG70).
*	*	*	*	*

NG 70 In Puerto Rico and the Virgin Islands only, the bands 159.240–159.435 and 160.410–160.620 MHz are also available for assignment to base stations and mobile stations in the Special Industrial Radio Service.

B. Part 89—Public Safety Radio Services.

Section 89.459(d) is amended by adding new limitations (17) to read as follows:

§ 89.459 FREQUENCIES AVAILABLE TO THE FORESTRY-CONSERVATION RADIO SERVICE.

* * * * * * *

(d) * * *

Frequency or Band	Class of station(s)	Limitations
*	*	*
159.240	do	17
159.255	do	17
159.270	do	17
159.285	do	17
159.300	do	17
159.315	do	17
159.330	do	17
159.345	do	17
159.360	do	17
159.375	do	17
159.390	do	17
159.405	do	17
159.420	do	17
159.435	do	17
*	*	*

(17) This frequency is shared with the Special Industrial Radio Service in Puerto Rico and the Virgin Islands. All applications for the assignment of a new frequency or to change existing facilities in such a manner as to require frequency coordination, as specified in Section 89.15 hereof, for stations in Puerto Rico or the Virgin Islands, shall be accompanied by evidence of interservice frequency coordination.

C. Part 91—Industrial Radio Services

Section 91.504(a) is amended, and a new par (d) is added to read as follows:

§ 91.504 FREQUENCIES AVAILABLE.

(a) The frequencies or bands of frequencies available for assignment to stations in this service are enumerated in the following table, together with the class of station(s) to which they are normally assigned, a general reference terminology, and the specific assignment limitations which are developed in paragraph (b) of this section. Special provisions relating to the availability and

the assignment of certain frequencies above 152 MHz in Hawaii, Puerto Rico, and the Virgin Islands are contained in paragraphs (c) and (d) of this section.

* * * * * * *

(d) The following frequencies are available only in Puerto Rico and the Virgin Islands for shared use by base and mobile stations licensed in the Forestry-Conservation, Railroad and Special Industrial Radio Services.

Base and mobile:	*Mobile only:*	Base and mobile:	*Mobile only:*
159.240	160.410	159.345	160.515
159.255	160.425	159.360	160.530
159.270	160.440	159.375	160.545
159.285	160.455	159.390	160.560
159.300	160.470	159.405	160.575
159.315	160.485	159.420	160.590
159.330	160.500	159.435	160.605

(1) A mobile station may be assigned the frequency of an associated base station. Such operation may, however, subject the single frequency system to interference that would not occur to a two-frequency system.

(2) The foregoing "Mobile Only" frequencies may be assigned to a control station association with a mobile relay system if it is also assigned to the associated mobile station.

(3) The foregoing "Base and Mobile" and "Mobile Only" frequencies are available on a shared basis in the Forestry-Conservation and Railroad Radio Services, respectively. All applications for the assignment of a new frequency, or to change existing facilities in such a manner as to require frequency coordination, as specified in Section 91.8(a) hereof, shall be accompanied by evidence of frequency coordination with the sharing service.

D. Part 93—Land Transportation Radio Services

Section 93.352(a) is amended by adding new limitation (4) to read as follows:

§ 93.352 Frequencies Below 952 MHz Available for Base and Mobile Stations.

* * * * * * *

	MHz		MHz
4	160.410	4	160.515
4	160.425	4	160.530
4	160.440	4	160.545
4	160.455	4	160.560
4	160.470	4	160.575
4	160.485	4	160.590
4	160.500	4	160.605

* * * * * * *

(4) This frequency is shared with the Special Industrial Radio Service in Puerto Rico and the Virgin Islands. All applications for the assignment of a new frequency or to change existing facilities in such a manner as to require frequency coordination, as specified in § 93.9 hereof, for stations in Puerto Rico or the Virgin Islands, shall be accompanied by evidence of interservice frequency coordination.

FCC 74-776

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TELECOMMUNICATIONS CONTRACTING INTERNATIONAL, HOMESTEAD AIR FORCE BASE, FLA. For Certificate of Compliance	CAC-3565 (FL306)

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 24, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING

1. Telecommunications Contracting International has filed an application for a certificate of compliance to commence cable television service at Homestead Air Force Base, Florida, located within the Miami, Florida, major television market (#21). Tele-Communications proposes carriage of the following television signals: [1]

WPLG-TV (ABC, Channel 10) Miami, Florida
WTVJ (CBS, Channel 4) Miami, Florida
WCKT (NBC, Channel 7) Miami, Florida
WPBT (Educ., Channel 2) Miami, Florida
WSEC-TV (Educ., Channel 17) Miami, Florida
WCIX-TV (Ind., Channel 6) Miami, Florida
WLTV (Ind., Channel 23) Miami, Florida
WKID (Ind., Channel 51) Ft. Lauderdale, Florida

Carriage of these signals is consistent with Section 76.61 of the Commission's Rules. The application is unopposed.

2. The applicant contends that the "CATV Franchise Agreement", which was awarded pursuant to the procedures specified in Air Force Regulation 70-3, fully complies with the franchise standards of Section 76.31 of the Commission's Rules. We disagree with applicant's contention. In *Cable Antenna Systems*, FCC 74-646, —— FCC 2d —— (1974), and *Cablevision Service Inc.*, FCC 74-669, —— FCC 2d —— (1974), we held that franchise agreements awarded pursuant to Air Force Regulation 70-3 were inconsistent with Sections 76.31(a)(1) and (4) of the Rules. However, because of the unusual nature of operations of military installations and the special considerations which led Congress to establish the armed forces procurement statute, we believed it appropriate to waive the requirements of Sections 76.31(a)(1) and (4) of the Rules. Since the franchise agreement is in other respects consistent with Section 76.31, we will issue a certificate of compliance.

[1] The applicant will comply with the access provisions of Section 76.251 of the Rules. The system will have a twenty channel capacity of which eight will be used for television signal carriage.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–3565), filed by Telecommunications Contracting International, IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

47 F.C.C. 2d

FCC 74-711

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
TELEPROMPTER CABLE COMMUNICATIONS CORP., BIG FORK MONT.	CSR-95 (MT038)
TELEPROMPTER CABLE COMMUNICATIONS CORP., POLSON, MONT.	CSR-96 (MT017)
Requests for Special Relief	

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 10, 1974)

BY THE COMMISSION:

1. On April 6, 1972, Garryowen Butte T.V. Inc., licensee of Station KPAX-TV (ABC/CBS, Channel 8), Missoula, Montana, sent a letter to TelePrompTer Cable Communications Corporation (hereinafter TPT) requesting carriage and program exclusivity protection on the cable television systems operated by TPT at Big Fork and Polson, Montana. In its "Petition for Waiver of Sections 76.57(a), 76.59(a), 76.91 and 76.93 of the Rules," filed April 21, 1972, TPT requests special relief from the Commission's carriage and program exclusivity rules as they relate to Station KPAX-TV. The Polson and Big Fork systems serve their subscribers with the following television broadcast signals:

KGVO-TV (NBC/ABC, Channel 13) Missoula, Montana
KREM-TV (ABC, Channel 2) Spokane, Washington
KXLY-TV (CBS, Channel 4) Spokane, Washington
KHQ-TV (NBC, Channel 6) Spokane, Washington
CJOC-TV (CBC, Channel 7) Lethbridge, Alberta, Canada

In addition, as discussed below, TPT's Polson system has recently added KPAX-TV to its signal carriage.

2. TPT supports its carriage and program exclusivity waiver requests on the grounds that (a) the systems have a five-channel capacity, already saturated with other television broadcast signals, and (b) compliance with Garryowen's request would disrupt long-established viewing habits. Additionally, petitioner at first insisted that the Polson and Big Fork systems, which then served 481 and 142 subscribers, respectively, were exempt from the carriage and program exclusivity provisions of the Rules by virtue of the Commission's *Notice of Proposed Rule Making in Docket No. 18785*, FCC 70-65, —— FCC 2d ——, which proposed to exempt systems serving fewer than 500 subscribers from the Commission's carriage and exclusivity rules, and the prior "TEMPORARY MODIFICATION OF PROCESSING PRIORITIES IN SECTION 74.1103 WAIVER CASES," FCC 68-

259, which announced a deferral of Commission action on carriage and exclusivity cases involving systems with fewer than 500 subscribers. TPT further noted that "rewiring" of its two systems was being considered and that upon completion of this process KPAX–TV's signal would be carried.

3. The Garryowen opposition, filed May 31, 1972, asserts that, pursuant to the Commission's Rules, Station KPAX–TV is a "must-carry" signal on both systems. The Big Fork system, located in the Kalispell, Montana smaller television market, and TPT's Polson system, located outside of all television markets, are each within KPAX–TV's predicted Grade B contour. (Section 76.57 and 76.59 of the Rules require cable systems in smaller markets and those located outside of all markets to carry, on request, signals of television broadcast stations placing a predicted Grade B contour over the cable community). Garryowen claims that substitution of Station KPAX–TV for one of the distant stations, "such as KXLY–TV or CJOC–TV," carried in Big Fork and Polson would cause little disruptive effect and questions whether there is any serious community of interest between the cable communities and either Spokane, Washington or Lethbridge, Alberta, Canada. Garryowen further maintains that carriage of Station KPAX–TV, operational only since 1970, is essential to its achieving parity with its Missoula competitor, Station KGVO–TV, already carried by TPT and on the air since 1954. Regarding both carriage and exclusivity protection, Garryowen argues, *inter alia*, that the Commission's exemption of systems serving fewer than 500 subscribers was not intended to achieve inequities such as the exclusion of "local" signals to the benefit of out-of-state and foreign stations.

4. In reply, TPT reiterates many of its earlier arguments and contends that its deletion of either KXLY–TV or CJOC–TV (as suggested by Garryowen) would cause its subscribers to either lose a "significantly viewed" signal (KXLY–TV)[1] or be deprived of the minimum service complement of the Commission's Rules which ". . . recognize that every cable system, regardless of its location, is entitled to carry the signal of at least one independent signal . . ." (in this case, that of Station CJOC–TV). In conclusion, TPT notes that if either its Polson or Big Fork system reaches 500 subscribers the ground for the requested waiver will be gone and the operator will either provide carriage and exclusivity protection or seek waiver on another ground.

5. On December 12, 1972, TPT filed, on behalf of its Polson system, a "Supplement to Petition of April 21, 1972, and Petition for Waiver." This document first notes that the Polson system now serves over 500 subscribers. TPT further explains that the system is being rewired and asks that it be granted a one-year waiver of the carriage rules vis-a-vis the signal of Station KPAX–TV. Petitioner insists that its Polson system should be granted waiver of the Commission's exclusivity rules (even though it now serves more than 500 subscribers) for several reasons. TPT asserts that protection of KPAX–TV's CBS network programming (KPAX–TV also carries certain ABC network

[1] See Appendix B, *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 at 394.

programs) would require deletion of Station KXLY–TV, Spokane, a station already noted as significantly viewed. Additionally, TPT incorporates by reference the arguments in its petitions for special relief submitted on behalf of its Missoula (CSR–213) and Hamilton (CSR–214), Montana systems. In these petitions TPT argues that KPAX–TV should be denied same-day program exclusivity protection because it (a) is a "100% satellite station" which has no locally originated programming, and (b) broadcasts a signal of allegedly inferior quality. Furthermore, the Missoula and Hamilton petitions ask that, in the event we deny TPT's requests for waiver, the Commission at least rule that Station KPAX–TV be entitled to same-day protection for only one network's programming.

6. The "Opposition of Garryowen Corporation to Supplement to Petition of April 21, 1972 and Petition for Waiver," filed January 22, 1973, argues that TPT's failure to carry Station KPAX–TV on its five-channel Polson system defeats a basic portion of the Commission's regulatory scheme as the station is a "must-carry" not only because of its predicted Grade B contour, but also by its apparent status as "significantly viewed" in the county of the system.[2] Additionally, Garryowen contends that TPT's exclusivity waiver arguments incorporated from the Missoula and Hamilton petitions (CSR–213, CSR–214) have already been thoroughly refuted by Garryowen's responsive pleading therein. Garryowen asks the Commission to deny the Polson petition and require TPT to carry Station KPAX–TV and temporarily delete carriage of Station CJOC–TV until there is sufficient channel capacity to carry both signals. TPT's "Reply to Opposition to Supplement to Petition of April 21, 1972 and Petition for Waiver," filed February 12, 1973, again requests a one-year waiver of the carriage rules and recounts, in more detail, the arguments made in its Missoula and Hamilton petitions for waiver of the exclusivity rules *vis-a-vis* Station KPAX–TV.

7. On December 12, 1973, TPT submitted a "Supplement to Petition" which referenced its contemporaneous filing of notice, pursuant to Section 76.11(a) of the Rules[3] of its intention to add the signal of Station KPAX–TV to the Polson system. On January 12, 1974, the Acting Chief, Cable Television Bureau, notified the system operator that no objection to such carriage had been filed with the Commission. Thus, with respect to the Polson system, the issue of Station KPAX–TV's carriage is now moot. And consistent with our recent

[2] Appendix B, *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, supra*, lists Station "KXLF +," Butte, Montana, as significantly viewed in Polson's Lake County, Montana. Because of the plus (+) sign, which indicates that the viewing is due to either the parent or the satellite, and Polson's proximity to Missoula rather than Butte, Garryowen insists that KPAX–TV, not its parent, Station KXLF–TV, is significantly viewed in Lake County; however, we note that KPAX–TV's status as a "must-carry" signal does not depend upon its alleged significant viewing.

[3] Section 76.11(a) of the Rules states as follows: "No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission: *Provided, however,* That an existing system may add a television signal, pursuant to Sections 76.57(a)(1)–(3), 76.59(a)(1)–(3) and (5), 76.61(a)(1)–(3), or 76.63(a) (as it relates to Section 76.61(a)(1)–(3), or the signal of a noncommercial educational television station that is operated by an agency of the state within which the system is located, pursuant to Sections 76.57(b), 76.59(c), 76.61(d), or 76.63(a) (as it relates to Section 76.61(d)), without filing an application or receiving a certificate of compliance, if the system serves the information required by Section 76.13(b)(1) on the Commission and the parties named in Section 76.13(a)(6) at least thirty (30) days before commencing such carriage and no objection is filed with the Commission within thirty (30) days after such service is made. See Section 1.47 of this chapter."

rejection of the TPT arguments incorporated from its Missoula and Hamilton petitions (see *TelePrompTer Cable Communications Corporation*, FCC 74–655, —— FCC 2d ——, and the relevant case law cited therein) we deny that portion of TPT's Polson petition (CSR–96) seeking waiver of the Commission's program exclusivity rules. That a significantly viewed signal (KXLY–TV) may be subject to certain program deletion does not detract from the rights of Station WPAX–TV nor the obligations of the system's operator. We shall, therefore, require TPT to afford same-day network program exclusivity to newly carried Station KPAX–TV on its Polson, Montana cable system.

8. Because the Big Fork system serves fewer than 500 subscribers we shall dismiss, as moot, that portion of CSR–95 seeking waiver of the Commission's program exclusivity rules. *Report and Order in Docket No. 18785*, FCC 74–299, —— FCC 2d ——. The above-cited *Report and Order in Docket No. 18785* did not, however, adopt the proposed exemption of small systems from the Commission's carriage rules. Therefore, we must now address the carriage issues as they affect Big Fork. As noted earlier, the five-channel capacity Big Fork system now carries five television broadcast signals. Of these five stations, three are licensed to Spokane, Washington, and one is from Lethbridge, Alberta, Canada. None of these four stations casts a predicted Grade B contour over Big Fork and only two (KREM–TV and KXLY–TV, both licensed to Spokane) are significantly viewed [4] and, therefore, "must-carry" signals. But, Station KPAX–TV, which casts a predicted Grade B contour over the Big Fork cable community, also is a "must-carry" signal. Accordingly, we shall, *sua sponte*, partially waive Section 76.11 of the Rules and order carriage of Station KPAX–TV on the Big Fork system. As noted in *Hoosier Telecable Corporation*, FCC 73–1003, 43 FCC 2d 248, the Commission never contemplated, and Section 76.65 of the Rules [5] does not provide, that a cable system may deny mandatory carriage in favor of a distant signal. Whether TPT meets its carriage obligations by channel expansion, deletion of a signal, or composite carriage, is a matter for its own decision. Furthermore, TPT misconstrues the "service complement" provisions of the Rules. Relevant Section 76.59, applying to Big Fork's smaller market status, first requires (Section 76.59(a)) carriage of certain "must-carry" television broadcast signals. The Commission further specifies (Section 76.59(b)) that a smaller market system ". . . *may carry* sufficient additional signals so that . . . it can provide the signals of a full network station of each of the major national television networks, and of one independent television station (emphasis supplied)." But, such additional signals can be added, in the manner specified by the Rules, only if sufficient channel capacity is available. It is irrelevant that certain "additional signals" are al-

[4] See Appendix B, *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, supra.*

[5] Section 76.65 of the Commission's Rules provides, in pertinent part, as follows: "The provisions of Sections 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972: *Provided, however,* That if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart."

ready grandfathered on the Big Fork system. Upon expansion of the system's channel capacity all authorized signals may be carried, subject to exclusivity projection, on a full-time basis.

In view of the foregoing, the Commission finds that grant of the requested petitions for waiver would be inconsistent with the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, That the petitions for special relief (CSR–95, CSR–96) filed by TelePrompTer Cable Communications Corporation, operator of cable television systems at Big Fork and Polson, Montana, ARE DENIED, to the extent indicated above, and otherwise ARE DISMISSED, as moot.

IT IS FURTHER ORDERED, That TelePrompTer Cable Communications Corporation IS DIRECTED to comply with the provisions of Sections 76.91 and 76.93 of the Commission's Rules on its cable television system at Polson, Montana, within thirty (30) days of the release date of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED, That TelePrompTer Cable Communications Corporation IS DIRECTED to comply with the provisions of Section 76.59(a) of the Commission's Rules by its carriage of Station KPAX–TV, Missoula, Montana, on its cable television system at Big Fork, Montana, within thirty (30) days of the release date of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED, That Section 76.11(a) of the Commission's Rules is partially waived to permit expedited carriage of Station KPAX–TV, Missoula, Montana, on the cable television system operated by TelePrompTer Cable Communications Corporation at Big Fork, Montana.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-782

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of THUNDER BAY BROADCASTING CORP., ALPENA, MICH. NORTH AMERICAN BROADCASTING CO., ALPENA, MICH. For Construction Permits for a New Television Broadcast Station	File No. (BPCT-4469) File No. (BPCT-4482)

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 30, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has before it for consideration the applications of Thunder Bay Broadcasting Corporation (BPCT-4469) and North American Broadcasting Company (BPCT-4482) for construction permits for a new commercial television broadcast station to operate on channel 11, Alpena, Michigan. Also before the Commission is a joint request for approval of agreement, filed by the above parties March 27, 1972, pursuant to section 1.525 of the Commission's rules,[1] and a "Petition to Deny or Designate for Hearing" the application of Thunder Bay Broadcasting Corporation, filed September 1, 1972, by Northern Entertainment, Inc., licensee of WGTU-TV, channel 29, Traverse City, Michigan.[2]

2. The above-captioned applications are mutually exclusive in that operation as proposed, on the same channel in the same community, would result in mutually destructive interference. To remove this conflict and expedite consideration of the Thunder Bay Broadcasting Corporation (Thunder Bay) application, the applicants have filed a joint request which seeks withdrawal of the North American Broadcasting Company (North American) application and grant of the Thunder Bay application. In addition, the agreement provides for Thunder Bay's reimbursement of North American in an amount determined by the Commission to have been legitimately and prudently expended in connection with the preparing, filing and prosecution of North American's application, but not in any event to exceed $6,992.82. In accordance with the provisions of section 1.525 of the rules, the applicants have attached to the joint request (a) a copy of the agree-

[1] On April 19, 1972, counsel for North American Broadcasting Company submitted a supplement to the joint request, in support of the reimbursement of expenses.

[2] Thunder Bay's Opposition was filed September 25, 1972; a Reply was filed by Northern on October 12, 1972. On April 9, 1974, Northern filed a "Supplement to Petition to Deny or Designate for Hearing," which is the subject of a responsive letter from Thomas Scanlan, President of Thunder Bay, dated April 18, 1974, and a reply pleading from Northern, filed June 12, 1974.

ment; (b) affidavits which recite the facts on who instituted the negotiations, a history of the negotiations, and the reasons the petitioners believe the agreement is in the public interest; and (c) supporting affidavits concerning monies claimed by the dismissing applicant.

3. Section 311(c)(3) of the Communications Act of 1934, as amended, permits the Commission to approve such an agreement only if it determines that the agreement is consistent with the public interest, convenience or necessity. The subsection also provides that if the agreement:

> Contemplates the making of any direct or indirect payment to any party thereto in consideration of the withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing and advocating the granting of his application.

While North American has submitted a list of expenses totalling $8,283.59, it has substantiated only $6,409.36 as legitimately and prudently incurred.[3]

One item of $1,874.23, listed as a personnel expense for the services of Richard Nagel, does not constitute a reimbursable expense under section 311(c)(3).[4] Mr. Nagel is an officer, director and subscriber of 3.22 percent of North American's stock. North American has submitted a letter from National Electronics Transmission Service, Inc. (NETS), which states that Nagel was released from his job with NETS for six weeks in order to work on various aspects of North American's application, including the preparation and coordination of the application, the contacting of stock subscribers, the interviewing of community leaders and the acquisition of a tower site. North American asserts that it reimbursed NETS, which continued to pay Nagel's salary, and now American in turn seeks reimbursement of that expense from Thunder Bay. Section 311(c)(3) of the Act and section 1.525(a) of the rules do not allow for compensation for one's personal time as a legitimate and reimbursable expense. *Robert J. Martin*, FCC 65R–77, 4 RR 2d 647 (Rev. Bd., 1965); *Victor Management Co., Inc.*, 1 FCC 2d 1131, 6 RR 2d 253 (Rev. Bd., 1965). Nagel's position as an officer, director and stock subscriber establishes a concurrency of interest between Nagel and North American which precludes reimbursement of expenses incurred in connection with his services to North American. Moreover, there is no distinction between North American paying Nagel directly for his services or reimbursing Nagel's employer for his time spent working for North American. Nor has North American established that Nagel's services were beyond the scope of his corporate responsibilities or were rendered pursuant to a separate compensation agreement. *Great River Broadcasting, Inc.*, 18 FCC 2d 592 (1969). Thus, we shall approve reimbursement of only

[3] These reimbursable expenses include the following: legal and engineering fees—$4,528.91; application filing fee—$1,000; corporation franchise fee—$260; newspaper publication fee—$24.20; and telephone and travel expenses—$596.25.

[4] In this connection, it should be noted that reimbursement of the full $1,874.23 for Mr. Nagel's services would, in any event, exceed by $1,290.77 the $6,992.82 maximum reimbursement specified in the agreement.

$6,409.36 to North American for expenses legitimately and prudently incurred.

4. Northern Entertainment, Inc. (Northern), licensee of station WGTU, channel 29, Traverse City, Michigan has filed a petition asking the Commission to deny Thunder Bay's application, or designate the application for hearing. Northern's petition was filed September 1, 1972, nearly a full year after the filing of Thunder Bay's application September 24, 1971. It was not, therefore, timely filed in accordance with the provisions of section 309(d)(1) of the Communications Act, and accordingly will be dismissed. Likewise, Northern's "Supplement to Petition to Deny," which was filed April 9, 1974, 48 days after Thunder Bay's last major amendment (as defined by section 1.572(a)(1)) to its application, rather than within 30 days, as is required by section 1.580(i) of the rules. Therefore, that pleading also will be dismissed. However, the matters contained in Northern's petition raise among other things, unique and important questions concerning the Commission's policy of fostering the development of UHF television, and will therefore be treated as informal objections, pursuant to section 1.587 of the rules.

5. Northern's objections also go to Thunder Bay's asserted failure to demonstrate that it is financially qualified to construct and operate the proposed station. We have considered Northern's claim, and find it is without merit. Thunder Bay's plan of financing includes a loan of $400,000 from the Peoples Bank and Trust Company of Alpena; a loan of $30,000 from Mr. T. A. Scanlan, Jr.;[5] cash on hand of $48,111; and stock subscriptions receivable in the amount of $119,880. The following stockholders, Cloyd G. Ramsey, Robert G. Boynton, Donald Rumbles, and Frederick T. Johnston, have not submitted balance sheets or financial statements indicating current and liquid assets sufficiently in excess of current liabilities to permit them to fulfill their stock subscription obligations. Therefore, we will not consider their subscriptions to be available to Thunder Bay, thereby reducing the amount of stock subscriptions receivable from $119,800 to $92,800. Thus, the total funds available to Thunder Bay for the period of construction and the first year of operation are $570,611.

6. Because Northern has also questioned whether a network affiliation will be available, Thunder Bay has submitted alternative financial proposals, one to be implemented if the station receives a hoped-for affiliation with the ABC television network,[6] the other to be implemented if such an affiliation is not available. Under the non-network

[5] Mr. T. A. Scanlan, Jr., is the father of Thomas Scanlan, President of Thunder Bay.

[6] Northern has claimed that because an ABC affiliation will not be available to Thunder Bay, a hearing is therefore required. We do not agree, inasmuch as Thunder Bay has assured the Commission that it will construct whether or not an affiliation is available, and we find Thunder Bay financially qualified under both proposals. Northern has also raised the question of whether Thunder Bay's network proposal is valid, inasmuch as it provides for 70 hours of network programming. Northern claims only 54 hours of programming are available from the network. A review of ABC's Television Network Program Schedule for the month of July 1974 discloses that ABC offered for that month a total of 67 hours of regular network programming each week, plus two-hour sports specials on Sunday, July 21, and Sunday, July 28. We do not think the small discrepancy between the applicant's proposal and the actual network schedule is significant, particularly as the network schedule may vary from time to time. For example, in June 1974, ABC offered its affiliates 68½ hours of programming each week.

proposal,[7] Thunder Bay will require an estimated $405,504 to construct the station and operate it for one year, itemized as follows:

13 monthly equipment lease payments [8] at $14,400	$187,200
14 monthly payments on transmitter site lease at $100	1,400
11 lease payments [9] on studio at $225	2,475
Start-up expenses [10]	71,409
Operating expenses:	
Salaries	75,000
Programming	20,020
Fees and Memberships	11,000
Administrative	5,000
Utilities	7,500
Sales	5,000
Engineering	6,000
News	6,500
Miscellaneous	7,000
Total	143,020
Grand total	405,504

7. Under the network proposal, Thunder Bay's requirements will total $504,084, including:

Equipment lease payments	$187,200
Transmitter site lease payments	1,400
Studio lease payments	2,475
Start-up expenses	71,409
Operating expenses:	
Salaries	130,000
Programming	20,000
Fees and Memberships	11,000
Administrative	5,000
Utilities	22,500
Sales	9,000
Engineering	6,000
News	8,000
Miscellaneous	7,000
Total	218,500
Grand total	480,984

8. In addition, we believe Thunder Bay will require approximately $18,900 for the delivery of ABC programming via microwave to its transmitter. Northern has pointed out that ABC does not under all circumstances assume the cost of delivering programming to its affiliates. Northern arrived at the $18,900 estimate for the use of the common

[7] Thunder Bay's non-network proposal is for 21 hours a week of programming (three hours a day), including 2 hours, 34 minutes of news, 1 hour 50 minutes of public affairs, and 3 hours, 18 minutes of "other" programming exclusive of sports and entertainment. Our rules require a minimum of 12 hours a week of programming (at least two hours a day, five days of the week) during the first 18 months of operation (section 73.651(a)(1)).

[8] According to the lease agreement with HBE Leasing Co. (see discussion at paragraph 17), the first payment will come due 30 days after delivery. We assume a period of 60 days will be required between the delivery of the equipment and the commencement of operation. *Brown Broadcasting, Inc.*, 2 FCC 2d 189, 2 RR 2d 826 (1968). Thus, Thunder Bay will be required to make one payment prior to commencing operations and 12 payments during the first year of operation.

[9] The first lease payment on the studio will come due one month after Thunder Bay begins broadcasting.

[10] These include the grant fee, the payment to NABC (see paragraph 3, above), legal and engineering fees, installation and remodeling costs, freight charges, and other miscellaneous expenses.

carrier facilities of American Microwave on the basis of a $15 per month/per mile charge over a distance of 105 miles. Thunder Bay estimates the cost of such service at $14,400 a year, but has not described the basis for that estimate, and concedes that Northern's estimate is "realistic." Therefore, it will be accepted for the purpose of this analysis, bringing Thunder Bay's costs under the network proposal to $499,884.

9. Northern has attacked Thunder Bay's financial proposal along a broad front, including virtually every estimated expense, and has offered alternative estimates which purportedly are based on its experience since beginning operation in 1971. We believe that Northern's various assertions (with the exception of the cost of microwave program delivery service, discussed above) are not relevant to Thunder Bay's proposal, and that Thunder Bay's estimates of its first-year expenses are reasonable. Thus we will not substitute either our judgment or Northern's, for the applicant's, and we will not make any further adjustment in our estimate of Thunder Bay's financial requirements.

10. Thunder Bay has responded in detail to Northern's claims. In many instances, the differences are matters of accounting. For example, Thunder Bay has allocated expenses associated with its news programming among categories described above as "Salaries," "Fees and Memberships," and "News Expense," rather than under a single heading. In other instances, the differences can simply be ascribed to matters of taste or business judgment, such as Northern's insistence that Thunder Bay had not adequately allowed for "Travel and Entertainment." Noting that it has provided for some travel expenses under accounts for news, sales and engineering expenses, Thunder Bay points out that "Entertainment is not being considered by Thunder Bay as a necessary or operant entity in the prudent operation of the television station proposed." In this connection, we take official notice that the area served by WGTU is more populous and developed than that which Thunder Bay will serve, and therefore presumably more capable of sustaining a station with comparatively higher expenses. We also note that WGTU, which entered a market already occupied by two VHF stations, in order to maintain a competitive posture may well have been obligated to make significant expenditures which Thunder Bay will not experience because it will be the first commercial television station in Alpena.

11. Northern also claims that Thunder Bay has not provided for sufficient staff to operate the proposed station. It claims three additional transmitter operators are required because Thunder Bay has not proposed remote control operation. Northern has overlooked provision in Thunder Bay's proposed equipment package for remote control equipment. Northern also suggests that Thunder Bay's proposed news operation (under the network proposal) cannot be implemented with only two full-time employees. Thunder Bay plans to offer two half-hour local and regional newscasts a day; seven days a week. The station will subscribe to the Associated Press broadcast wire service. Taking into consideration the small size of Alpena (13,805, according to the 1970 census), we do not believe this proposal is incapable of

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effectuation. See, e.g., *Broadcasting-Telecasting Services, Inc.*, FCC 71–412, 21 RR 2d 858, 860 (1971).

12. While Thunder Bay's proposal may be frugal, we do not find it so far below "average" to conclude that the station cannot be operated as proposed with the allocated funds. *Midwestern Broadcasting Co., Inc.*, 15 FCC 2d 720, 724, 15 RR 2d 76 (1968). Having found, therefore, that Thunder Bay will have $570,611 available to meet costs of construction and first year operating expenses estimated at $499,884 and $405,504 for network and non-network operation respectively, we further find that Thunder Bay is financially qualified, under criteria established in *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965).

13. However, Northern insists that we pursue our review of Thunder Bay's financial arrangements into the second year of operation, citing *Ultravision, supra*, at 547; *A–C Broadcasters* 10 FCC 2d 256, 11 RR 2d 359 (1967); *Greenfield Broadcasting Corp.*, 32 FCC 2d 135 (1971) *5 KW, Inc.* 33 FCC 2d 895, 23 RR 2d 1015 (Rev. Bd., 1972); and *Robert Cowan Wagner*, 38 FCC 2d 1187, 26 RR 2d 429 (Rev. Bd., 1973). In *Ultravision*, we stated that because of our interest in a "continuing operation," we would "scrutinize with care the applicant's itemization of expenses," where "installment payments or other fixed charges" have been deferred beyond the first year in order to meet the basic test of financial ability. 1 FCC 2d at 547. In *A–C Broadcasters*, we found an assignee of a construction permit financially unqualified because of "[t]he capital structure . . ., which results in pyramiding debt on debt; . . . the deferral of substantial fixed charges beyond the first year; and the heavy cash drain once [the assignee] begins to repay the stockholder loans." 10 FCC 2d, at 260. The other cases cited by Northern follow those general principles.

14. We do not think this is such a case. The above cases have been characterized by a virtual absence of risk capital, while Thunder Bay's stockholders have committed more than $150,000. While Thunder Bay will incur a substantial debt, equipment lease payments have been included in its first year operating expenses, and only repayment of the loans has been deferred.[11]

15. Under the non-network plan, assuming a continued rate of expenditure at the first year level, Thunder Bay's operating expenses for the second twelve months will be $296,320, not counting loan repayment. It will have available for this purpose the surplus from the first year of operation of $165,100 (plus interest on that amount), plus whatever revenue is generated during the station's first 24 months on the air. Approximately $120,000 would be required if no payment is made on the loans. Northern questions whether, if Thunder Bay is forced to operate without a network affiliation, it will have available any cash flow to sustain the operation over the second year. Northern's argument is that if expenses in the second year continue at the first year level, Thunder Bay will literally run out of cash, because of Thunder Bay's limited hours of operation under the non-network pro-

[11] Both the loan from the People's Bank & Trust Company of Alpena, and the loan from T. A. Scanlan, Jr., provide that terms for reduction of principal will be negotiated after the first year.

posal, and the asserted unattractiveness of Thunder Bay's non-network schedule to advertisers:

> At least 1 hour, 50 minutes per week would be devoted to public affairs programs, which presumably would not be available for sponsorship. Additional programming would consist of free films obtained from governmental, religious and barter organizations and, by their very nature and source, would merely provide programming without producing cash income from sponsors.

We cannot accept Northern's conclusion that public affairs programming is by definition not available for sponsorship. We also note that one of the primary purposes of barter programming is to provide both the program producer *and* the broadcaster an opportunity to sell spots within the program. Therefore, we conclude that, in all likelihood, Thunder Bay will experience some revenue during its first year of operation, even without a network affiliation. We note in this connection the small number of over-the-air broadcast services in Thunder Bay's service area and thus the scarcity of outlets for those wishing to purchase broadcast advertising. It could be that the novelty of a local television advertising outlet will generate revenue *in excess* of what Thunder Bay has estimated ($100,000 in the first year). But Northern has not shown that $120,000 or more in revenue will not be available over the two year period.

16. Concerning the matter of repayment of the bank loan, the letter committing the loan to Thunder Bay states that payments of principal and interest will be deferred for one year, and that "terms of repayment will be negotiated at that time." Northern claims that "[i]n the absence of any more definitive provision for repayment, it is just as reasonable to assume the entire amount would become payable at the end of one year as to assume any other schedule of repayment." Clearly, that would materially increase Thunder Bay's cost of operation in the second year. However, we do not agree with Northern's premise. Northern would have us make the assumption, which we do not find reasonable, that the bank would insist on terms of repayment which would jeopardize the safety of its investment.[12] Rejecting that assumption, we conclude that the terms of the bank's letter do not require us to apply the *Ultravision* test to Thunder Bay's second year of operation.[13]

17. Northern also claims that a hearing is required to inquire into whether HBE Leasing Company, from whom Thunder Bay proposes to lease its equipment, will require additional security above and beyond the lease agreement. Northern incorporates in its June 12, 1974, pleading what purports to be an exchange of correspondence between Northern's counsel and a representative (unidentified) of HBE. The thrust of this colloquy is that HBE often requires some additional security other than the lease agreement. No copies of the correspondence have been attached to Northern's pleadings, or any affidavits sworn to and submitted, or even any explanation offered as to the circumstances under which the question was raised. There is

[12] We note that Bill McDonnell and Robert G. Boynton, officers of the bank, will serve as officers and directors of Thunder Bay, and that a third member of Thunder Bay's board of directors, and the firm's Treasurer, Franklin T. Johnston appears from the application to be a major stockholder in the bank, and that a third officer of the bank, Thomas Gapske, is a subscriber of Thunder Bay's stock.

[13] Northern apparently does not contest the availability of the bank loan.

no indication in HBE's letter to Thunder Bay of April 18, 1974, that any additional security will be required, and clearly, hearsay of the sort relied on by Northern is not sufficient to raise a substantial and material question to the contrary.

18. In addition to objecting to the application on the grounds discussed above, Northern also asks the Commission to designate the application for hearing, because of the potential adverse impact of a new VHF service on WGTU's UHF operation. According to Northern, "[i]f Thunder Bay's application is granted and the proposed station is constructed and placed in operation with an affiliation with the ABC Television Network, Northern Entertainment will have no alternative to suspension of operation." [14]

19. A description of the geography of Northern Michigan, and the prevailing status of television authorizations in the area is in order at this point. Traverse City is a community of some 18,048 persons, located on the west side of the northern part of Michigan's lower peninsula. Alpena is on the opposite side of the peninsula, approximately 110 miles east of Traverse City. The population of Alpena is 13,805. Channels 7 and 29 are assigned to Traverse City; Channels *6 and 11 are assigned to Alpena. Other assignments in the area are channel 9, Cadillac; channel 4, Cheboygan; channel *23, Petoskey; channel *24, West Branch; and channels 8, 10, and *32 in Sault Ste. Marie at the eastern end of the upper peninsula.

20. Channel 7 in Traverse City is occupied by station WPBN–TV, which is affiliated with the NBC television network, and operates station WTOM–TV, channel 4, Cheboygan, as a satellite. WGTU is an ABC affiliate. Traverse City is also served by the principal city signal of station WWTV, channel 9, Cadillac, a CBS affiliate with a satellite, WWUP–TV, on channel 10 in Sault Ste. Marie. In addition, Central Michigan University is the permittee for WCML–TV, channel *6, Alpena, to be operated as a satellite of WCMU–TV, Mount Pleasant, Michigan. Of the above commercial stations, only WTOM–TV, Cheboygan, places a Grade B signal over the city of Alpena. WWUP–TV's predicted Grade B contour cuts through part of Alpena County, north of the city of Alpena. Local aural services in Alpena consist of standard broadcast station WATZ (1 Kw daytime—250w nighttime), which is duplicated 100 percent by station WATZ–FM; and station WHSB(FM).

21. Under Thunder Bay's proposed operation, the station's predicted Grade B contour will overlap that of WGTU over portions of three counties—Montmorency, Oscoda, and Ogemaw—encompassing approximately 400 square miles, or roughly 4.7 percent of WGTU's Grade B service area. Northern asserts that the Grade B contour does not define the furthest limit of a VHF station's service and that the impact of Thunder Bay's proposed operation will therefore be felt over a much wider area, citing the *Sixth Report and Order on Television Allocations*, 41 FCC 148, 175–176 (1952). What we said in the *Sixth Report and Order* was that "the proposed methods for describ-

[14] We note that Northern has elsewhere argued that Thunder Bay's likelihood of obtaining a network affiliation is so slim as to cast doubt on its financial qualifications. Since we conclude that our UHF impact policy does not apply to this case, it is not necessary for us to unravel the logical conundrum posed by Northern's pleading.

ing service areas . . . are expected to give a fairly good service description on a large area basis but not necessarily on an individual station basis." *supra.*, at 175. The "Grade B contour" of a television station is a line along which every location has the same probability of receiving effective service, i.e., receivers at fifty percent of the locations will have good reception at least fifty percent of the time. Probabilities less than that do not, we believe, represent effective service. In actual operation, without sophisticated receiving antennas, it is just as likely that the limits of effective service will fall within Thunder Bay's predicted Grade B contour as without. Thus, there is no reason for us to assume that Thunder Bay's impact on WGTU will extend beyond the Alpena station's predicted Grade B signal. Contrary to Northern's assertion, that position is perfectly consistent with section 73.683(b)(i) of the rules, which specifically provides for use of the iso-service contours to "estimat[e] . . . coverage resulting from the selection of a particular transmitter site."

22. Northern also asks the Commission to consider the impact of authorization of a new station in Alpena and WGTU's carriage by the Alpena CATV system. Northern alleges that WGTU's signal has been carried on the Alpena cable system since January, 1974, and that continued carriage on the system is essential if Northern is to sell advertising time to national and regional advertisers. This is said to be because such advertisers will not purchase time unless the station delivers at least 10,000 average quarter-hour prime time households. Northern asserts that addition of WGTU to the Alpena system represented the crossing of the 10,000 prime time television homes threshold, and that non-duplication protection afforded an Alpena ABC-affiliated TV station by the Alpena cable system would cause WGTU's audience to fall back below 10,000 homes, reversing a trend toward equalization of revenues and expenditures.

23. The Commission's concern for the development of UHF television is well-documented and continuing.[15] However, the principle is not immutable, and must, when appropriate circumstances converge, give way.

24. The Commission has *twice* determined that the public interest would be served by allocation of channel 11 to Alpena, first when the channel was originally assigned to that community, and most recently when Northern unsuccessfully sought by rule-making to substitute UHF channel 33 for channel 11 at Alpena (reconsideration denied, FCC 74-308, 29 RR 2d 1386 (1974)). Channel 11 is Alpena's only commercial television assignment. In rejecting Northern's proposal, the Commission explicitly set forth the pulic interest considerations that led to its decision:

> Against the conjectural advantages of the changes to Northern are arranged the specific representations of Thunder Bay: it would not proceed if a UHF channel were substituted. In fact, Northern itself states that there was no possibility that another UHF station would be established in the area in the

[15] *KTVO, Inc.*, FCC 74-685 (June 26, 1974); *WLCY-TV, Inc.*, 38 FCC 2d 86, 90 (1972); *West Michigan Telecasters, Inc.*, 22 FCC 2d 943, 946, 18 RR 2d 1166 (1970); *South Carolina Educational Television Commission, et al.*, 18 FCC 2d 328, 331, 16 RR 2d 725 (1969); *Selma Television, Inc.*, 12 FCC 2d 781, 12 RR 2d 1082 (1968); *Central Coast Television, Inc.*, 14 FCC 2d 985, 14 RR 2d 575 (1968); *Triangle Publications, Inc.*, 29 FCC 315, 17 RR 624 (1964), aff'd sub. nom. *Triangle Publications, Inc. v. FCC*, 291 F. 2d 324, 21 RR 2039 (1961).

near future. Thus, Alpena's opportunity for a first local commercial television operation would end. . . . 29 RR 2d, at 1389–90.

If Northern here, by claiming adverse impact on UHF television, is allowed to frustrate the inauguration of a first local service, it will effectively nullify the Commission's earlier decisions, and thwart the mandate of section 307(b) of the Communications Act to "provide a fair, efficient, and equitable distribution of service" among states and communities.[16]

25. In the present case, the applicant has taken every measure which we could reasonably require in order to minimize the possible adverse consequences on WGTU. Originally filed as a proposal for a full-power, non-directional operation, Thunder Bay has since amended its application to provide for operation using a directionalized antenna system to suppress radiation in the direction of WGTU. At its nearest point, Thunder Bays' predicted Grade B contour would fall 58 miles short of Traverse City. The resulting overlap is approximately four hundred square miles of sparsely populated countryside.[17] This amounts to 4.7 percent of the total area within the Grade B contour of WGTU. This insignificant overlap is not going to be the critical factor in the ultimate success or failure of WGTU, when considered together with the total extent of the Traverse City-Cadillac market.[18]

26. Thus Northern's allegation ultimately rests on what is essentially a fortuity: its carriage on the Alpena cable system, some 38 miles beyond WGTU's predicted Grade B contour. Under our cable television rules (47 C.F.R. Part 76.1, *et seq.*), WGTU, with or without the presence of a local station in Alpena, has no "right" to carriage on the Alpena cable system. Currently, Alpena is outside any recognized television market.[19] Thus the carriage of WGTU's signal is completely discretionary with the system operator (section 76.57(b)). For that reason, WGTU has no vested interest in its continued carriage on the Alpena cable system. Furthermore, because the Alpena cable system has been "certified" to carry, among others, the signal of WGTU, the authorization of a new ABC-affiliated station in Alpena will not require the deletion of WGTU's signal from the system, except

[16] *Santa Fe TV, Inc.*, 18 FCC 2d 741, 16 RR 2d 934 (1969), would at first seem to be at variance with this principle. There an application for a new VHF television station in Santa Fe, New Mexico, which had no local station, was designated for hearing on its potential for adversely affecting the development of UHF television in Albuquerque, where UHF assignments existed, but were unused. However, the Commission noted that the transmitter location selected by the applicant would place a 96 dBu signal over Albuquerque, and only a 76 dBu signal over Santa Fe. The Commission therefore concluded that a hearing was also necessary on the question whether grant of the application would result in a *de facto* reallocation of the channel from Santa Fe (population 37,000) to Albuquerque (population 225,000). Thus it is clear that the case did not include the crucial element that is decisive in this case: the activation of a fallow VHF channel assignment to bring first-time local television service to a community, but was rather an effort to bring a *fourth* commercial service to Albuquerque. We re-emphasize that Thunder Bay's proposed operation will not serve the Traverse City area.

[17] The only community of any size within the overlap area appears to be the city of West Branch, with a population (1970 Census) of 1,912.

[18] In 1970, the following counties, which lie totally within WGTU's Grade B contour, had a combined population of 138,111: Antrim, Charlevoix, Crawford, Grand Traverse, Kalkaska, Leelanau, Missaukee, Otsego, Roscommon, and Wexford. In addition, WGTU's Grade B contour encompasses substantial areas within Benzie, Cheboygan, Clare, Emmet, Gladwin, Lake, Manistee and Osceola counties. The overlap with the channel 11 proposal occurs in Montmorency, Ogemaw and Oscoda counties. The trend in most of these counties is toward increasing population.

[19] Nothern's insistence on including Alpena in the Traverse City-Cadillac television market (Area of Dominant Influence) is the result of ARB's practice of assigning to some ADI *every* county in which there is significant television viewing. For the purposes of our cable rules, we do not consider Alpena to be part of the Traverse City-Cadillac market.

insofar as is required by the exclusivity requirements of sections 76.91 and 76.151. Thus we conclude that WGTU's audience in Alpena is not one which requires or warrants our intervention to "protect" WGTU against a new station licensed to serve the Alpena community.

27. This would not be the first time the Commission found allegations of adverse UHF impact subordinate to considerations of a first local service. See, e.g., *TV Table of Assignments: Mount Vernon, Illinois*, 22 FCC 2d 222, 18 RR 2d 1625, aff'd sub. nom. *Plains Television Corporation* v. *FCC*, 142 U.S. App. D.C. 248, 250, 440 F. 2d 276, 278 (1971); and *Selma Television, Inc.*, 29 FCC 2d 522, 531, 21 RR 2d 1151 (1971), aff'd sub. nom. *WCOV, Inc.* v. *FCC*, 150 U.S. App. D.C. 303, 464, F. 2d 812 (1972), wherein the Court stated that "[i]t is hardly arbitrary or irrational to hold . . . that any UHF impact is easily outweighed by the need to provide the Selma market with television service." 464 F. 2d, at 815. Once a construction permit is issued to Thunder Bay, Northern may, on "traditional" UHF impact grounds, oppose future applications for increased height or abandonment of directionalization, if the result of such action by Thunder Bay would be a significant incursion into Northern's service area and revenues. *WLOY-TV, Inc.*, 25 FCC 2d 832, 20 RR 2d 445 (1970).

28. Northern also requests addition of a *Carroll* issue,[20] alleging that the inauguration of a new VHF service in Alpena would have an adverse economic effect on WGTU's operation with a resulting diminution or loss of television service to the public. However, Northern has not updated its showing in that regard since its Reply pleading of October 16, 1972. At that time, Thunder Bay was proposing a nondirectional operation with substantial (nearly 60 percent) overlap of WGTU's Grade B contour. Since that time, Thunder Bay, as noted above (paragraph 25), has amended its proposal and would overlap WGTU's Grade B contour only over parts of three counties, totalling 398 square miles. In none of its pleadings has Northern made any references to its income from the area which would be overlapped by the Thunder Bay proposal. Thus, applying the standard utilized in the usual *Carroll* case, Northern's request would be summarily dismissed. *South Carolina Educational Television Commission, et al*, 18 FCC 2d 328, 332, 16 RR 2d 725 (1969). However, this is not the usual *Carroll*-type case, where the petitioner's station and the applicant's proposed station would have largely co-extensive service areas. In fact, because of the minor overlap, it is clear that WGTU and Thunder Bay would not be competing for local advertising revenue. However, with respect to regional and national advertisers, in its showing on the UHF impact question, Northern avers that:

> Establishment of a station at Alpena affiliated with the ABC television network, as proposed by Thunder Bay, would (1) so fractionalize the audience that WGTU's average quarter hour households would drop below the 10,000 mark, and (2) would require the CATV system to provide the Alpena station with nonduplication protection. The impact on WGTU would be disastrous. Instead of steadily decreasing the gap between expenditures and income, as now is being done by WGTU, the rate of decrease would be reduced and the pattern of continued losses of $200,000 and more each year would be reestablished.

[20] *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066 (1958).

29. Even if this allegation is to be considered in connection with Northern's request for a *Carroll* issue, it still falls short of the required showing. In *WLVA, Inc.* v. *FCC*, 459 F.2d 1286, 23 RR 2d 2081 (1972), the Court found that the petitioner had simply assumed that a loss of audience would inevitably cause national and regional advertisers to switch to its competitors, without offering corroborating evidence, and concluded that "appellant has failed to plead specific factual data sufficient to raise a substantial and material question as to the likelihood that a grant of WRFT–TV's application will cause WLVA–TV to suffer a significant loss of income." 459 F. 2d, at 1300. The court in *WLVA, Inc.* also stated that:

> It cannot simply be assumed that the market's capacity to generate income is essentially static and that any increased competition must inevitably result in a long-range reduction in income. Thus, a mere showing of loss of existing sources of advertising does not, without more, raise a substantial and material question of fact as to adverse economic impact. Id., at 1298–99.

As noted above, Northern has only once submitted information regarding the economics of the market, and that information for one year only (1970), and it has not been updated. Under the circumstances, Northern can hardly be said to have satisfied its burden of pleading.

30. Since the three aspects of the *Carroll* issue are essentially interdependent, Northern's failure to satisfy the first component renders it impossible to satisfy the second, and so forth. *WLVA, Inc.*, supra at 1300 (fn. 47). Assuming *arguendo*, however, that Northern had met its burden, the Commission would nevertheless be required to reach the same conclusion reached above on the question of UHF impact. Under the most ruinous circumstances for WTGU, i.e., loss of its network affiliation and suspension of operation, there would be some reduction in public service programming available to those areas now within WGTU's Grade B contours. However, there would be an increase in public service programming to many of those within Thunder Bay's service area. Because Thunder Bay will not serve the Traverse City-Cadillac area, its service would not replace the service lost by the demise of WGTU. But, because the Traverse City-Cadillac area would continue to be served by two local television stations, the public interest would clearly be better served by inauguration of a first local service in Alpena.

31. The *Carroll* case itself does not require a hearing in this context. The concern in that case was that "To license two stations where there is revenue for only one may result in no good service at all." 258 F. 2d at 443. In other words, the court was concerned that a community continue to have at least one effective service. In this case, if Northern's objections were to be sustained, Traverse City-Cadillac would be left with three local television stations, and Alpena with none,[21] a clearly

[21] As noted above, station WCML–TV, Alpena, a noncommercial educational station, will be a satellite of WCMU–TV, Mount Pleasant, Michigan. Thunder Bay has estimated the number of persons receiving a first over-the-air Grade B or better signal if the Thunder Bay proposal is implemented at 31,092, and a first Grade B or better signal from a local (non-satellite) station at 63,348.

inequitable situation not in the public interest.[22] The Court in *Carroll* recognized the Commission's obligation to weigh competing public interest factors:

> Private economic injury is by no means always, or even usually reflected in public detriment. Competitors may severely injure each other to the great benefit of the public. The broadcast industry is a competitive one, but competitive effects may under some sets of circumstances produce detriment to the public interest. When that happens, the public interest controls.

In this case, the controlling public interest factor is the first local service to Alpena.[23]

33. Finally, the proposed main studio location for Thunder Bay is approximately one-fifth mile outside the Alpena city limits. It is an existing building, which the applicant proposes to remodel to suit its purposes. It is located on a main thoroughfare (state highway M–32), and the applicant represents that there is adequate parking on the site. Accordingly, the Commission finds that the showing of good cause required by section 73.613(b) of the rules has been made, and authorization of a main studio location outside the principal community should be granted.

34. Upon due consideration of the application and the pleadings, the Commission finds that Thunder Bay Broadcasting Corporation is legally, technically, financially and otherwise qualified to construct, own and operate the proposed new commercial television broadcast station and that Northern Entertainment, Inc., has failed to raise a substantial and material question to the contrary, and that a grant of the application would serve the public interest, convenience and necessity. The Commission further finds that the dismissal of the North American Broadcasting Company application and the grant of the Thunder Bay Broadcasting Corporation would promote the early inauguration of a new (the first local) television broadcast service in Alpena, and that therefore the dismissal agreement is consistent with the public interest.

Accordingly, IT IS ORDERED, That the Joint Request for Approval of Agreement IS GRANTED, and the dismissal agreement

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[22] The Commission has attached a high priority to a first local service since adoption of the Table of Assignments, stating in the *Sixth Report and Order:* "In proposing the Table of Assignments set out in the Third Notice the Commission said that it had . . . endeavored to meet the twofold objective set forth in Sections 1 and 307(b) of the Communications Act of 1943, to provide television service, as far as possible to all people of the United States and to provide a fair, efficient and equitable distribution of television broadcast stations to the several states and communities.

"In attempting to carry out these objectives, the Commission set forth certain principles, in terms of priorities, underlying the Table of Assignments. These principles were:

Priority No. 1: To provide at least one television service to all parts of the United States.

Priority No. 2: To provide each community with at least one television broadcast station.

Priority No. 3: To provide a choice of at least two television services to all parts of the United States.

Priority No. 4: To provide each community with at least two television broadcast stations.

Priority No. 5: Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, and the number of television services available to such community from television stations located in other communities."

41 FCC 148, 167 (1952), footnote omitted.

[23] It does not appear that WGTU has at any time made a serious effort to serve Alpena. At one time, Northern had on file an application (BPTT–2562) for a new translator station to operate on output channel 55 at Alpena. However, on February 26, 1974, the application was dismissed for failure to respond to Commission correspondence and failure to prosecute the application.

dated March 20, 1972, IS APPROVED to the extent indicated herein; that the application (BPCT–4482) of North American Broadcasting Company IS DISMISSED; that the "Petition to Deny" filed September 1, 1972, by Northern Entertainment, Inc., IS DISMISSED, and the "Supplement to Petition to Deny" filed April 9, 1974, by Northern Entertainment, Inc., also IS DISMISSED; and that the application (BPCT–4469) of Thunder Bay Broadcasting Corporation IS GRANTED in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-720

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JOHN J. TIBILETTI (KAVU(TV)), VICTORIA, TEX. For Extension of Completion Date	Docket No. 20101 File No. BMPCT-7351

ORDER

(Adopted July 2, 1974; Released July 12, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the request of John J. Tibiletti (Tibiletti) for reinstatement of construction permit, call sign, and application (BMPCT-7351) for extension of time within which to complete construction of television broadcast station KAVU, Channel 25, Victoria, Texas.

2. On December 27, 1967, Tibiletti filed an application (BPCT-4064) for a construction permit for a new commercial television broadcast station to operate on channel 25, Victoria, Texas. This application was granted on February 25, 1969, with completion of construction required as of October 25, 1969. Subsequently, on October 22, 1969, Tibiletti filed an application (BMPCT-7099) for an extension of time within which to complete construction and alleged that erection of an antenna tower had commenced and that negotiations for equipment were under way. This was followed by a letter on February 10, 1970, stating that construction of the television tower was being delayed until completion of the tower extension upon which the antenna was to be mounted. The application was granted on March 23, 1970, with completion of construction required as of September 23, 1970. On September 1, 1970, Tibiletti filed a second extension application (BMPCT-7429) stating that construction of station KAVU was contingent upon the prior completion of construction of his FM broadcast station, KTXN, Victoria, Texas. On September 28, 1970, the Chief, Broadcast Bureau, acting pursuant to delegated authority, dismissed the extension application, cancelled the construction permit and deleted the call sign. By letter of counsel, dated November 25, 1970, Tibiletti protested the actions of the Chief, Broadcast Bureau and in a verified statement set forth certain events which allegedly had caused delays in the construction of station KAVU. By order, FCC 71-59 (27 FCC 2d 877), released January 29, 1971, the Commission, *inter alia*, reinstated KAVU's construction permit, call sign, and extension application, and designated the application for oral argument before the Review Board on the question of Tibiletti's lack of diligence in proceeding with construction of station KAVU. On March 31, 1971, the Review Board granted the application for extension of time to complete construction,

and extended the construction permit until November 10, 1971. This action was based on Tibiletti's representations to the Review Board on March 9, 1971, that the station's tower had been built; that equipment had been ordered and a down payment made; that the studios and offices were almost completed; that personnel had been hired; and that the station would commence operation within four months.

3. On September 17, 1971, Tibiletti filed an application (BAPCT–490) to assign the KAVU construction permit to K-Six Television Inc.[1] Thereafter, on September 24, 1971, Tibiletti filed the present application (BMPCT–7351) for an extension of time within to complete construction of the station and requested that the construction permit be extended for six months or until the Commission acts on the pending assignment application. By letter dated March 17, 1972, Tibiletti was requested to advise the Commission of the steps he had taken toward completion of construction since the last extension application was granted on March 31, 1971. In addition, Tibiletti was requested to inform the Commission as to when he decided to assign his construction permit and when negotiations for the sale of the permit commenced. In Tibiletti's response of May 22, 1972, he indicated that after the extension application was granted, he reviewed potential operating costs and market studies and concluded that it would be necessary to expand the station's facilities and that additional financing would be necessary. He further indicated that negotiations with respect to the assignment of the permit were under way during the first months of 1971, and that construction was not completed in view of the possibility of new ownership. On January 3, 1974, the Chief, Broadcast Bureau, acting under delegated authority, dismissed the extension application, cancelled the construction permit for KAVU, and deleted the call letters; stating that the applicant had not exercised due diligence in the prosecution of construction or demonstrated that construction of station KAVU was prevented by causes not under his control. In a letter dated January 30, 1974, requesting reinstatement of his permit, Tibiletti stated that he is financially unable to complete construction of the station, and that it would be in the public interest to extend the construction permit for six months or until the Commission acts on the pending assignment application. Furthermore, he alleged that he had expended considerable time and money in an effort to complete construction of the station, which will not be recovered from the proposed sale of the construction permit.

4. In view of the foregoing sequence of events, questions are raised as to whether the applicant made misrepresentations to the Review Board as to his plans for construction of station KAVU, and whether the applicant has been diligent in proceeding with construction of the station.

5. Accordingly, IT IS ORDERED, That the construction permit, call sign and extension application of television station KAVU, channel 25, Victoria, Texas, ARE REINSTATED.

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[1] Action on the assignment application (BAPCT–490) and a petition to deny filed by Guadalupe Valley Telecasting Company, Inc., licensee of television broadcast station KXIX, channel 19, Victoria, Texas, will be held in abeyance pending a resolution of this proceeding.

6. IT IS FURTHER ORDERED, That the application for an extension of time within which to complete construction of station KAVU, channel 25, Victoria, Texas, IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent order, upon the following issues:

(a) To determine the facts and circumstances surrounding the applicant's negotiations for sale of his construction permit.

(b) To determine, in light of the evidence adduced on the above issue, whether the applicant misrepresented his plans for the construction of the station and, if so, whether the applicant has the requisite qualifications to be a Commission licensee.

(c) To determine whether the reasons advanced by the applicant, in support of his request for an extension of his completion date, constitute a showing that failure to complete construction was due to causes not under his control or constitute a showing of other matters sufficient to warrant a further extension of time within the meaning of section 319(b) of the Communications Act of 1934, as amended, and section 1.534(a) of the Commission's rules.

(d) To determine, in light of the evidence adduced on the above issues, whether a grant of the application for extension of time within which to complete construction of station KAVU would serve the public interest, convenience and necessity.

7. IT IS FURTHER ORDERED, That, to avail himself of the opportunity to be heard, the applicant herein, pursuant to Sec. 1.221(c) of the Commission's rules, in person or by attorney, shall, within twenty (20) days of the mailing of this order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this order.

8. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-733

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VANHU, INC., SEATTLE, WASH. For Certificate of Compliance	CAC-3219 WAO22

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 11, 1974)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT.

1. On November 2, 1973, Vanhu, Inc., filed the above-captioned application for a certificate of compliance to commence cable television service at Seattle, Washington, within the Seattle-Tacoma, Washington, major television market (#20). On December 27, 1973, a "Petition for Special Relief" was filed in connection with this application by KIRO, Inc., licensee of Station KIRO-TV, Seattle, Washington. On January 16, 1974, a similar petition was filed by Fisher's Blend Station, Inc., licensee of Station KOMO-TV, Seattle, Washington. Vanhu proposes carriage of the following television broadcast signals:

KOMO-TV (ABC, Channel 4) Seattle, Washington
KING-TV (NBC, Channel 5) Seattle, Washington
KIRO-TV (CBS, Channel 7) Seattle, Washington
KSTW (Ind., Channel 11) Tacoma, Washington
KTVW (Ind., Channel 13) Tacoma, Washington
KCTS-TV (Educ., Channel 9) Seattle, Washington
KTPS (Educ., Channel 62) Tacoma, Washington
KVOS-TV (CBS, Channel 12) Bellingham, Washington
CBUT (CBC, Channel 2) Vancouver, British Columbia, Canada
CHEK-TV (CBC, Channel 6) Victoria, British Columbia, Canada
CHAN-TV (CTV, Channel 8) Vancouver, British Columbia, Canada

Vanhu's signal carriage and access proposal are consistent with the provisions of Sections 76.61, 76.65, and 76.251 of the Commission's Rules.

2. KIRO and Fisher's Blend request program exclusivity protection against the Canadian stations' prerelease of network programming. KIRO claims that 14½ hours of its CBS network programming (11½ hours of prime time programming) must be unprotected by the Commission's current exclusivity rules. Fisher's Blend, an ABC station claims that 6½ hours of its ABC network programming is duplicated.[1] KIRO argues that the fractionalizing effect of this duplication can be

[1] Petitioners claim that an average of 16 CBS network programs and an average of 7 ABC network programs are carried per week by the subject Canadian stations on a prereleased basis.

expected to result in an erosion of twenty to fifty percent of its market in cable areas, and argues that several prior Commission decisions support its contention that special relief is appropriate.[2] Fisher's Blend argues that the Canadian prelease problem is analogous to the issues which led the Commission to provide special exclusivity rules in the Mountain Time Zone, and that the cumulative effect of prerelease program carriage in the Seattle market is of significant proportion. Both stations ask that any grant of a certificate of compliance should be conditioned upon Vanhu's deletion of all duplicative American network programming carried by CHEK–TV, CHAN–TV, and CBUT, prior to, or on the same day as, such programming is carried by KIRO–TV or KOMO–TV at the regularly scheduled network time.

3. We find that petitioners' claims are unsubstantiated and that their requests for special relief must be denied. The petitions raise the issues that were considered in *Colorcable, Inc.*, 25 FCC 2d 195 (1970). As a part of that proceeding, Fisher's Blend asked for special relief against the prerelease of network programming, particularly in connection with the carriage of CHEK–TV and CBUT on a cable system in Seattle. Following a thorough review of this issue at that time, we concluded that the market effect of prereleased programming did not warrant the grant of such exclusivity protection. In that decision we noted that claims of adverse financial impact were speculative and insufficiently supported, that the U.S. stations involved were financially viable without such protection, and that the market place could bring about appropriate rate adjustments without Commission action. Moreover, we emphasized that prior Commission decisions concerning Canadian prerelease did not create a "right" to prerelease protection, nor amend the Cable Television Rules to require such protection.[3] In light of our clear position in *Colorcable*, we cannot concluded that petitioners' showings demonstrate that the number of prereleased programs or programming hours will have a severe economic impact on the Seattle market.[4] We take particular cognizance of the petitioners' failure to provide evidence of an adverse financial impact in light of the fact that these stations have experienced for some years the effects of just this type of prereleased programming carriage on other cable systems in their market. The very fact that none of the dire results predicted by the petitioners in *Colorcable* has been demonstrated in this proceeding lends credence to our decision at that time. Moreover, we are appreciative of the fact that three other cable television systems already operate in Seattle with carriage

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[2] *Jamestown Cablevision, Inc.*, 6 FCC 2d 635 (1967); *Northern Microwave Service, Inc.*, 7 FCC 2d 115 (1967), *vacated and remanded sub nom. Presque Isle TV Co. v. United States*, 387 F. 2d 502 (1967), modified in 21 FCC 2d 290 (prerelease protection not ordered in modification); and *General Electric Cablevision Corporation*, 10 FCC 2d 739 (1967).

[3] Our decision in *Colorcable* analyzed the subject prerelease requests "in the context of the arguments presented, prior precedents, changing circumstances, and our accumulated experience in this area." We concluded: "[s]ubsequent information indicates that the prerelease problem is not especially significant. Indeed, whatever 'problem' exists seems to be on the verge of elimination, so that further Commission attention to this matter no longer appears warranted." *Supra*, at 197, 198. This decision effectively nullified the precedential value of the previous prerelease cases cited by petitioners (footnote 2), and placed a special burden of proof on any party seeking prerelease protection. See also Para. 112, *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

[4] In *Colorcable*, we determined that 10 prereleased programs per week could not be considered a significant number. In this case KIRO claims a slightly greater prerelease problem, and Fisher's Blend claims a slightly lesser problem.

of these Canadian signals, and that in the *Colorcable* decision we have already ruled on the Canadian prerelease issue with respect to one of the systems. Consequently, to restrict Vanhu's carriage of these signals would place it at an unfair competitive disadvantage. Fisher's Blend's attempt to analogize this problem to the Mountain Time Zone exclusivity rules is misdirected. Therein we specifically concluded that the problem was of sufficient proven magnitude to warrant a special rule.[5] We have previously made clear our determination that problems of prerelease will be examined on an *ad hoc* basis. *Colorcable*, *supra*.

4. As a part of the above-captioned application for a certificate of compliance, Vanhu has submitted a franchise (Ordinance No. 102363), granted to it by the City of Seattle on July 16, 1973, that is not fully consistent with the provisions of Section 76.31 of the Rules. The submitted franchise does not require a local business office, or specify a service complaint procedure, and it requires Vanhu to pay a fee of six percent (6%) of its gross revenues per year to the city. Vanhu has assured the Commission of its commitment to maintain a local business office and provide service complaint procedures, and has attempted to justify the six percent (6%) fee on the basis of a planned local regulatory program. It asserts that the City will establish and staff community access centers and an Office of Cable Communications, and will be using a portion of the revenues raised by this fee for the promotion of access channel use. In addition, it claims that the six percent (6%) fee will not impose an economic burden upon it and that such a fee would not interfere with the effectuation of federal regulatory goals in the field of cable television. The City of Seattle has notified the Commission of its support for this fee on the basis of its planned regulatory program.[6] Vanhu notes, moreover, that the three existing cable systems in Seattle already pay six percent (6%) fees pursuant to their franchises. It argues that to deny its application on the basis of a less-than-fully consistent franchise would be inequitable in light of the fact that it is entering a competitive environment with grandfathered systems that are subject to higher franchise fees than those permitted by Section 76.31.

5. Section 76.31(b) of the Commission's Rules requires such fees to be reasonable, ". . . (e.g., in the range of 3–5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments))." The attempts of Vanhu and the City of Seattle to justify a six percent (6%) fee in this instance are insufficient since no explanation is provided of a specific regulatory program or the estimated costs involved.[7] It should be noted, also, that it is not contemplated that such a showing would be used to justify a fee in excess of five percent (5%) of gross subscriber revenues,[8] and that the use of such fees for non-regulatory purposes such as access channel promotion would require a more specific justifica-

[5] Section 76.93(b); *see also, Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326 (1972), at paragraph 29.

[6] Letter from David L. Towne, Acting Chairman, City of Seattle Board of Public Works, to Federal Communications Commission, August 1, 1973.

[7] Paragraphs 101–106 of the *Clarification of The Cable Television Rules*, FCC 74–384, 46 FCC 2d 75 (1974), explain the type of detailed showing that is required for a waiver of the three percent fee limitation.

[8] *Id.*, at para. 103.

tion.[9] Therefore, we must conclude that this fee is unreasonable and inconsistent with Section 76.31(b). However, in accordance with our rulings in *A. N. Cable TV Company, Inc.*, 42 FCC 2d 291 (1973), and *Signal Master, Inc.*, 44 FCC 2d 860 (1973),[10] we consider it to be consistent with the public interest to grant Vanhu a certificate of compliance until 1977 on the basis of a substantially complaint franchise. In *A. N. Cable* and *Signal Master* we held that it would be unnecessarily unfair to place an applicant at a competitive disadvantage by requiring it to meet stricter franchise standards than those applicable to its already established competitors in the same community. Here, as in those instances, we will allow all the cable systems in the same community to operate until March 31, 1977, under substantially consistent franchises.

In view of the foregoing, the Commission finds that the issuance of the requested application for certificate of compliance until March 31, 1977, is consistent with the public interest, and that a grant of the submitted "Petition[s] for Special Relief" in connection with the above-captioned application is not in the public interest.

Accordingly, IT IS ORDERED, That the "Petition[s] for Special Relief", filed by KIRO, Inc., and by Fisher's Blend Station, Inc., in connection with the above-captioned application for certificate of compliance, ARE DENIED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–3219), filed by Vanhu, Inc., IS GRANTED, and an appropriate certificate of compliance be issued.

FEDERAL COMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[9] *Id.*, at para. 120.
[10] *See also, Lake County Cable TV, Inc.*, 42 FCC 2d 952 (1973).

FCC 74-709

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WARNER CABLE OF EASTERN MASSACHUSETTS, INC., D.B.A. WARNER CABLE OF QUINCY, QUINCY, MASS. For Certificate of Compliance	CAC-1719 MA066

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 12, 1974)

BY THE COMMISSION:

1. Warner Cable of Eastern Massachusetts, Inc., d/b/a Warner Cable of Quincy (hereafter "Warner"), has filed the above-captioned application for a certificate of compliance to operate a cable television system at Quincy, Massachusetts.[1] Warner proposes carriage of the following television broadcast signals:

WGBH-TV (Educ., Channel 2) Boston, Massachusetts
WBZ-TV (NBC, Channel 4) Boston, Massachusetts
WCVB-TV (ABC, Channel 5) Boston, Massachusetts
WNAC-TV (CBS, Channel 7) Boston, Massachusetts
WXNE-TV (CP/Ind., Channel 25) Boston, Massachusetts
WSBK-TV (Ind., Channel 38) Boston, Massachusetts
WGBX-TV (Educ., Channel 44) Boston, Massachusetts
WQTV (CP/Ind., Channel 68) Boston, Massachusetts
WSMW-TV (Ind., Channel 27) Worcester, Massachusetts
WKBG-TV (Ind., Channel 56) Cambridge, Massachusetts
WTEV (ABC, Channel 6) New Bedford, Massachusetts
WJAR-TV (NBC, Channel 10) Providence, Rhode Island
WPRI-TV (CBS, Channel 12) Providence, Rhode Island
WSBE-TV (Educ., Channel 36) Providence, Rhode Island
WNET (CP/Ind., Channel 64) Providence, Rhode Island
WENH (Educ., Channel 11) Durham, New Hampshire
WOR-TV (Ind., Channel 9) New York, New York
WPIX (Ind., Channel 11) New York, New York

This proposal is consistent with Section 76.61 of the Rules. Additionally, Warner plans to construct a 38-channel capacity system and to provide subscribers with the full complement of access services and facilities required by Section 76.251. Warner's franchise, granted September 13, 1972, conforms fully with the requirements of Sections 76.31(a)(2)—(a)(6) and 76.31(b) of the Rules.

[1] Quincy (pop. 87,966, 1970 census) is located within the Boston-Cambridge-Worcester, Massachusetts (#6) and the Providence, Rhode Island-New Bedford, Massachusetts (#33) major television markets.

2. Warner's signal carriage proposal is opposed by United Television Company of New Hampshire, Inc., licensee of Station WMUR–TV (ABC, Channel 9), Manchester, New Hampshire. This opposition prompted the filing of "Comments" by Boston Broadcasters, Inc., permittee of Station WCVB–TV, Boston, and WGAL Television, Inc., licensee of Television Broadcast Station WTEV, New Bedford, Massachusetts. Additionally, the withdrawal of an opposition originally filed by the Massachusetts Community Antenna Television Commission has precipitated the objection of Charles River Cable Television, Inc., an alleged competing applicant for a franchise to construct a cable television system in the City of Quincy. Warner has replied.

3. United objects to Warner's proposal to carry the signals of television stations licensed to Providence, Rhode Island, and New Bedford, Massachusetts, and to Warner's failure to request carriage of United's WMUR–TV. To support these objections, United argues that WMUR–TV competes with "the more powerful Boston stations" for audience, programming, and advertisers, and that the station "has a significant Quincy audience" and "places a Grade B signal over all of that community." Consequently, United continues, to deny carriage rights to WMUR–TV in Quincy, and to permit the importation of "essentially distant" competing signals from the Providence-New Bedford market, would "worsen [WMUR–TV's] competitive position and make it even more difficult for it to compete with the Boston television stations for program product and for advertising support." In response to United's objection, Warner notes (a) that television stations licensed to Providence and New Bedford are "mandatory" signals pursuant to the provisions of Sections 76.61(a)(1) and (a)(4) of the Rules, and (2) that carriage of a "distant" full-network station [WMUR–TV] that is not "significantly viewed" in Norfolk County, Massachusetts, would not be authorized by any provision of Section 76.61. Warner continues that it would be "agreeable to carriage" of WMUR–TV if such carriage were permitted by this Commission and concludes by asserting that United has not met the "substantial burden" necessary to justify restricting or prohibiting the carriage of otherwise permissible Providence and New Bedford television signals.[2] In its "Comments," Boston Broadcasters, Inc., objects to Warner's reply insofar as that reply constitutes an amendment to request carriage of WMUR–TV. WGAL Television "strenuously opposes" the efforts of United to secure a prohibition of Warner's carriage of WGAL's WTEV, New Bedford.

4. We conclude that United has not submitted a showing substantial and specific enough to warrant prohibiting the carriage of television signals that would otherwise be permissible and, indeed, could become mandatory under our Rules. Para. 112, *Cable Television Report and Order, supra; Spectrum Cable Systems, Inc.*, FCC 73–256, 40 FCC 2d 1019, *recons. denied*, FCC 73–1342, 44 FCC 2d 867 (1973); *Greater New England Cablevision Co.*, FCC 74–42, 45 FCC 2d 597 (1974.[3] Additionally, we conclude that United has not submitted a showing suffi-

[2] Para. 112, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 186–87 (1972).

[3] Appeal pending *sub nom. Springfield Television Broadcasting Corp.* v. *F.C.C.*, Case Nos. 74–1214, 1215, D.C. Circuit, and *The WHYN Stations Corp.* v. *F.C.C.*, Case Nos. 74–1216, 1217, D.C. Circuit.

cient to warrant deviation from the "go, no-go" concept of the Rules to require carriage of a distant network signal when carriage of that signal would not even be permissible without a grant of special relief. *See* Para. 113, *Cable Television Report and Order*, *supra* at 187. Consequently, United's opposition will be denied.

5. On December 5, 1972, the Massachusetts Community Antenna Television Commission filed a petition opposing Warner's application. In this petition, the Massachusetts Commission alleged (a) that the City of Quincy did not fully comply with the requirements of Section 76.31(a)(1) of our Rules in awarding a franchise to Warner [4], and (b) that the franchise was not awarded in compliance with Massachusetts law. After filing this petition, the Massachusetts Commission commenced a "thorough investigation" of the city's award, which satisfied the Commission that Warner's application was the only valid franchise application pending before the city during the period in which a franchise award was under consideration. Additionally, a series of discussions were held between representatives of the Massachusetts Commission, the City of Quincy, and Warner. Pursuant to these discussions, the following actions were taken:

(1) The franchise was amended to impose a stringent construction schedule [5] and to conform to the minimum requirements of Massachusetts law.

(2) A public hearing (preceded by adequate public notice) was held by the city on March 15, 1973, "to clarify due process and public participation issues" arising from the original grant of a franchise to Warner.

(3) A public report setting forth the basis for the grant of a franchise to Warner was issued by the City of Quincy.

These actions and the above-described investigation led the Massachusetts Commission to conclude that the franchising procedures employed by the City of Quincy were fully compliant with Massachusetts law and federal requirements. Accordingly, on July 23, 1973, that Commission filed a petition requesting the dismissal of its opposition. In view of that request, the opposition filed by the Massachusetts Community Antenna Television Commission will be dismissed as moot.

6. The withdrawal of the Massachusetts Commission's opposition prompted Charles River Cable Television, Inc., to file a petition opposing the grant of a certificate to Warner. Charles River, alleging that it is a competing applicant for a cable television franchise from the City of Quincy, makes the following assertions in support of its opposition:

(1) The franchise awarded Warner by the City of Quincy was not awarded in compliance with Massachusetts law.

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[4] Specifically, the Commission alleged that Warner's qualifications were not considered in a full public proceeding affording due process, that the procedures that were utilized did not include a full inquiry into Warner's business history ("which", the Commission asserted, "indicates that [Warner] or its affiliates had obtained licenses or franchises from 11 Massachusetts communities and had constructed a cable television system in only one of those communities"), that another valid franchise application pending before the city was not considered or passed upon prior to or during the proceedings relating to Warner's application, and that the city failed to issue a public report adequately setting forth the basis for its grant of a franchise to Warner.

[5] The Amendment requires Warner to complete construction "on or before September 1, 1974."

(2) The Massachusetts Commission has not fully resolved the doubts expressed in its original opposition to a grant of the instant application. Specifically, that Commission has not resolved doubts relating to Warner's business history in the Commonwealth and has not taken adequate steps to insure that such doubts will not recur in the future.

(3) The procedures utilized by the City of Quincy in awarding a franchise to Warner were not in conformity with Section 76.31(a)(1) of our Rules. Specifically, the procedures utilized deprived Charles River of due process because although Charles River had a valid application for a franchise pending before the city, the city at no time undertook to evaluate Charles River's qualifications and proposals, either in comparison with Warner's qualifications and proposals or otherwise.[6]

7. Charles River's opposition has precipitated replies from the Massachusetts Commission, the Mayor of the City of Quincy, and Warner. The Mayor reiterates his conclusion, which is supported by the Massachusetts Commission, that Charles River has never filed a formal application for a cable franchise with the city and that the series of letters Charles River sent between 1969 and 1973 did not contain enough information to enable the city to evaluate the qualifications of Charles River as an applicant. Additionally, the Mayor and Warner have supplied this Commission with information detailing the procedures utilized in awarding a franchise to Warner.[7] Finally, the Massachusetts Commission restates its conclusion that these procedures conformed fully, or were corrected to conform fully, with Massachusetts law. In response, Charles River reasserts its contentions that it is a valid franchise applicant, that the award of a franchise to Warner was not in compliance with Massachusetts and federal

[6] Charles River's contention that it is a valid applicant is based upon a series of letters written by the president of that company, John E. Donofrio, to the Mayor of the City of Quincy between November 13, 1969, and February 1, 1973. The November 13, 1969, letter identifies the officers and directors of Charles River and relates the interest of that company in receiving a cable television franchise from the city. In response, the Mayor informed Mr. Donofrio in a letter dated September 29, 1970, that the award of a cable franchise was "not being contemplated in Quincy at this time." A similar letter from Mr. Donofrio, dated January 20, 1971, met with a similar response from the mayor, dated February 2, 1971. By letter dated December 22, 1971, Mr. Donofrio requested that the city consider his earlier correspondence as constituting an application for a cable franchise. Charles River's interest in obtaining a franchise was reiterated in a letter dated September 8, 1972, and in a letter dated February 1, 1973, Mr. Donofrio informed the city that Charles River still considered itself to be an applicant for a franchise. Finally, by letter dated March 8, 1973, the Mayor of Quincy informed Mr. Donofrio that the latter's letter of February 1 did "not constitute a formal application as required by [Massachusetts law]" and that the city had "no material on file which would meet the requirements of [Massachusetts law]." Although the Mayor invited Charles River to submit a formal application for a cable franchise, the company has apparently not responded to the March 8 letter.

[7] Warner submitted an application for a franchise to the city in March, 1972. In June, 1972, a public hearing was held by the city "to elicit responses and comments on Warner's application." Prior notice of this hearing was published once a week for two successive weeks in the *Quincy Patriot Ledger* (the local newspaper of general circulation). Following this hearing, the Mayor appointed a committee (the members of which included the coordinator of the city's school library services, an electronics engineer, the city's director of public library services, a city councilman, and a local housewife) to examine the need of the city for a cable television system and to advise the Mayor concerning Warner's qualifications. This committee conducted meetings and hearings throughout the summer of 1972, and reports of its progress were published from time to time in the local newspaper. These procedures culminated in the award of a franchise to Warner on September 13, 1972. After the filing of the Massachusetts Commission's opposition and the investigation conducted by that Commission, another public hearing was held on March 15, 1973, to resolve issues raised in the Commission's opposition. Although it was served with formal notice of this hearing, Charles River chose not to send representatives because it had concluded that there was "no indication representatives of Charles River would even be recognized to speak, as a Charles River representative was neither a member of the community, nor a representative of [Warner]".

law, and that the Massachusetts Commission has not fully resolved doubts relating to Warner's business history in Massachusetts. To these contentions, Charles River adds assertions that a "thorough investigation" by the Massachusetts Commission "should have at least included some discussions or request for comments from the other applicants and interested parties", that "it was the legal and moral obligation" of the city and the Massachusetts Commission to fully investigate the qualifications of all companies expressing an interest in applying for a franchise and that Charles River "was never extended an invitation to participate in any meetings or hearings" conducted by the city or the Massachusetts Commission.

8. Initially, we note that the validity of Warner's franchise award under Massachusetts law and the legal sufficiency of Charles River's "application" for a cable franchise are questions of local law that should be resolved before local tribunals. Accordingly, we will not dispute the conclusions of the Mayor of Quincy and the Massachusetts Commission that Warner's franchise award was valid, and that Charles River is not, and has not been, a bona fide applicant for a cable franchise in the City of Quincy. If Charles River wishes to challenge these conclusions, the proper forum for such a challenge is in the state court system and is not before this Commission.

9. Additionally, we have concluded that the procedures utilized by the City of Quincy in awarding a franchise to Warner complied fully with the requirements of Section 76.31(a)(1) of the Rules. In Paragraph 178 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 207–08 (1972), we described the procedures we expected local authorities to utilize in awarding cable television franchises:

> We expect that franchising authorities will publicly invite applications, that all applications will be placed on public file, that notice of such filings will be given, that where appropriate a public hearing will be held to afford all interested persons an opportunity to testify on the qualifications of the applicants, and that the franchising authority will issue a public report setting forth the basis for its action. Such public participation in the franchising process is necessary to assure that the needs and desires of all segments of the community are carefully considered.

In the absence of evidence to the contrary, we have accepted detailed assurances from local authorities that their franchising processes had sufficient public participation to meet the requirements of Section 76.31(a)(1). *See, e.g., South Dakota Clearview Cable Co., Inc.*, FCC 72–842, 37 FCC 2d 1055 (1972); *Morgan County Tele-Cable, Inc.*, FCC 73–149, 39 FCC 2d 605 (1973); *Big Valley Cablevision, Inc.*, FCC 73–414, 40 FCC 2d 662, *recons. granted*, FCC 73–1244, 44 FCC 2d 1 (1973). In the instant case, we have been persuaded by both the franchising authority and the state cable television commission that two public hearings were held—one in June, 1972, to educe comments upon Warner's application, the other in March, 1973, to review the entire process culminating in the award of a franchise to Warner. Charles River does not contest the veracity of these assurances, but insists that the city and the state commission should have actively solicited Charles River's participation and formally invited Charles River to present its views. Charles River's voluntary refusal of an

opportunity to present these views at the public hearings is justified only by its unfounded conclusion that it would not be recognized if it did attempt to exercise that opportunity. Consequently, Charles River's non-participation in Quincy's franchising proceedings does not in any way diminish the "public" and "participatory" nature of those proceedings and does not alter our conclusion that the proceedings were fully compliant with the requirements of Section 76.31(a)(1). Accordingly, Charles River's contention that the requirements of that section were not met will be rejected and its opposition will be denied.

In view of the foregoing, the Commission finds that a grant of the above-captioned application for a certificate of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the opposition filed on December 5, 1972, by the Massachusetts Community Antenna Television Commission IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the opposition and petition for special relief, filed February 8, 1973, by United Television Company of New Hampshire, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the opposition filed August 9, 1973, by Charles River Cable Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the application for a certificate of compliance (CAC–1719), filed December 12, 1972, by Warner Cable of Eastern Massachusetts, Inc., d/b/a Warner Cable of Quincy, IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-687

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
WASHINGTON STAR-NEWS, WASHINGTON, D.C.
For Access to Minutes of the Executive
Policy Committee of A.T.&T.

JUNE 26, 1974.

Mr. STEPHEN M. AUG,
Washington Star-News,
225 Virginia Avenue SE.,
Washington, D.C.

DEAR MR. AUG: This is in reply to your correspondence of December 6, 1973 and March 26, 1974 in which you request access to the minutes of the Executive Policy Committee of AT&T. As you know, these minutes were made available to the Commission pursuant to a written agreement between the Bell System companies and the FCC Trial Staff in the course of its investigation in Phase II of the Docket No. 19129 proceeding.

You indicate that the primary reason for requesting the minutes is your interest in the decision-making process at the Bell System because it is a "regulated monopoly" and thus it is particularly important that the public be informed about how AT&T makes decisions concerning such matters as when to change its rates, how to respond to competitors and when to enter a financial market. You further suggest that the public should have access to AT&T documents such as the minutes, which presumably reflect its decision-making process, and that you would like to analyse and publish them in *The Washington Star-News.*

As you know, the Bell System opposes the disclosure of the minutes, indicating, among other things, that they summarize highly privileged and confidential discussions that AT&T has never disclosed publicly and that therefore the Commission is entitled under exemption 4 of the Freedom of Information Act and its rules implementing this exemption to withhold the requested material from compulsory disclosure to the public.[1] Although we have made no decision on the confidential nature of the information summarized in the minutes, for the reasons set forth below, we find no adequate basis for disclosure of these documents. However, as you know, some of the requested material already has been made public—and further release may follow—through inclusion in the record in this proceeding. Naturally, you are entitled to examine such information.

The minutes were furnished to the Trial Staff for its use in developing the record in the Docket No. 19129 proceeding with questions as

[1] The fourth exemption states: "This section does not apply to matters that are * * * (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4).

to the need for the disclosure of proprietary information to be determined later by the Administrative Law Judge in the event that the Trial Staff determined that it was relevant and necessary to the issues in the proceeding to introduce it into the record of evidence in the proceeding. The use of the information in the minutes in this proceeding is still being considered by the Trial Staff and the minutes are part of the investigatory file in this inquiry which has been compiled by the Trial Staff and which is specifically exempted from mandatory disclosure under exemption 7 of the Freedom of Information Act for "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. 552 (b) (7).[2]

In making this determination, we have taken note of the fact that we are not obliged to withhold materials simply because an exemption in the Act is applicable. Section 0.461(c) of our Rules, 47 CFR 0.461 (c), requires us, in the light of the facts presented and the supporting reasons, to make a public interest judgment on whether to disclose the requested items in spite of the availability of an exemption. We believe, however, that where, as here, no immediate need for disclosure appears and such disclosure may impair our ability to obtain similar materials through informal agreements in future investigations, the grant of your request would not serve the public interest.

It should also be noted that while exemption 4 may be applicable to the instant information, the fact that there is authority under exemption 7 to withhold all of the requested material makes it unnecessary for us to determine to what extent exemption 4 may afford an additional basis for non-disclosure.

The determination that we have authority under the Freedom of Information Act to withhold the requested minutes does not, of course, operate to preclude the Administrative Law Judge from making a different determination concerning the need to disclose them with respect to a party in the course of the proceedings in Docket No. 19129.

Reconsideration of our determination may be sought in accordance with the procedures specified in Section 1.106 of the Rules, 47 CFR 1.106.

Commissioner Hooks concurred in the result.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

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[2] Weisberg v. U.S. Department of Justice, 489 F. 2d 1195 (D.C. Cir. 1973) (en banc), *cert. denied*, 42 U.S.L.W. 3627 (U.S. May 14, 1974); Aspin v. Laird, 491 F. 2d 24 (D.C. Cir. 1973); Ditlow v. Brinegar, —— F. 2d ——, No. 73–1984 (D.C. Cir. February 27, 1974) (per curiam); Center for National Policy Review on Race and Urban Issues v. Weinberger, —— F. 2d ——, No. 73–1090 (D.C. Cir. May 21, 1974).

FCC 74-729

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Cease and Desist Order Directed Against WELCH ANTENNA CO., WELCH, W. VA.	Docket No. 20007 CSC-74 (WV196)

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 25, 1974)

BY THE COMMISSION:

1. This proceeding was initiated by an Order to Show Cause released April 24, 1974, FCC 74-359, —— FCC 2d ——, which directed Welch Antenna Company, operator of a cable television system at Welch, West Virginia, to show cause why it should not be ordered to cease and desist from further violation of Section 76.91 of the Commission's Rules on the above-captioned cable television system. Daily Telegraph Printing Company, licensee of Station WHIS-TV, Bluefield, West Virginia, had petitioned the Commission for such an order once before, and an Order to Show Cause was issued in *Welch Antenna Co.*, FCC 67-229, 10 FCC 2d 675. Thereafter, the parties executed an agreement which provided that Welch Antenna would provide nonduplication protection to WHIS-TV, and filed a copy thereof with the Commission. After reviewing the terms of this agreement, the Commission terminated the show cause proceeding in *Welch Antenna Co.*, FCC 68-239, 12 FCC 2d 162. In the instant petition, Daily Telegraph alleged that Welch Antenna was not providing network exclusivity protection to WHIS-TV, in violation of the Commission's Rules and the private agreement.

2. Pursuant to the Order to Show Cause, a prehearing conference was duly convened on May 16, 1974. Mr. William Turner, the principal and operator of Welch Antenna Company, appeared and waived hearing pursuant to Section 1.92(a)(3) of the Rules,[1] but reserved the right to submit a written statement in mitigation as provided for in Section 1.92(b) of the Rules.[2] The proceeding was then terminated by Order of the Presiding Officer, FCC 74M-568, released May 20, 1974, and the matter was certified to the Commission.

3. On May 20, 1974, at the direction of the Administrative Law

[1] Section 1.92(a)(3) of the Rules provides for waiver of hearing if "[T]he respondent files with the Commission, within the time specified for a written appearance in § 1.91(c), a written statement expressly waiving his rights to a hearing."

[2] Section 1.92(b) of the Rules provides that: "[W]hen a hearing is waived under the provisions of paragraph (a)(1) or (3) of this section, a written statement signed by the respondent denying or seeking to mitigate or justify the circumstances or conduct complained of in the order to show cause may be submitted within the time specified in § 1.91(c). The Commission in its discretion may accept a late statement. However, a statement tendered after the specified time has expired will not be accepted unless accompanied by a petition stating with particularity the facts and reasons relied on to justify such late filing. Such petitions for acceptance of a late statement will be granted only if the Commission determines that the facts and reasons stated therein constitute good cause for failure to file on time."

Judge, Welch Antenna filed with the Commission certain material in mitigation and extenuation dealing with the financial and technical difficulties of providing network exclusivity protection to WHIS–TV. The statement set out the cost of Welch Antenna's switching equipment and maintenance thereof and described the hardships involved in travelling to the remote headend to program the equipment. It further listed several programs which were not carried in their entirety due to malfunctions of WHIS–TV, last-minute program changes, equipment failures, or programming mistakes by Welch Antenna. Welch Antenna also filed another request for a waiver of our network exclusivity Rules.[3] Daily Telegraph Printing Company submitted a statement in rebuttal on June 4, 1974, also at the direction of the Administrative Law Judge. It points out that the system has almost two thousand subscribers, that the switching equipment was purchased in 1968, and that it could be programmed from the business office rather than at the headend. Daily Telegraph also claims that very few of the program interruptions were attributable to WHIS–TV, and urges that this proceeding be terminated by the issuance of a Cease and Desist Order in view of Welch Antenna's "callous disregard" of the Commission's rules.

4. Notwithstanding Welch Antenna's statements in mitigation, we do not believe the public interest will be served by the issuance of anything less than an order to cease and desist. Welch Antenna's admitted failure to provide network exclusivity protection to Station WHIS–TV amounts to a cavalier disregard of both the Commission's rules and the private agreement of 1968. Although it appears that appropriate exclusivity protection is now being accorded WHIS–TV, that protection was not initiated until these proceedings were commenced. And it was not disputed that, for several years following our decision in 1968 to terminate the earlier show cause proceeding, Welch Antenna did not obey the requirements of our rules despite its agreement with Daily Telegraph and its assurances to the Commission. In these circumstances, we believe the requested Order to Cease and Desist should issue.

Accordingly, IT IS ORDERED, That within two (2) days after release of this Memorandum Opinion and Order, Welch Antenna Company SHALL CEASE AND DESIST from the operation of its cable television system at Welch, West Virginia, in violation of Section 76.91 of the Commission's Rules and Regulations; provided however, that if Welch Antenna Company notifies the Commission within two (2) days of the release of this Memorandum Opinion and Order (exclusive of Saturdays, Sundays, and holidays, if any) that it intends to seek judicial stay within fourteen (14) days of the release date of this Order, this order shall be stayed for thirty-five (35) days from its release date or until judicial determination of a stay motion, whichever occurs first.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

[3] In our designation order in this proceeding, we noted that Mr. Turner had submitted a petition for waiver which was procedurally defective. That petition was dismissed accordingly. This new petition will not be considered in the course of these proceedings since we have previously addressed the same issues.

FCC 74-753

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN TELEVISION CO., RAPID CITY, S. DAK. For Conditional Grant Pursuant to Section 1.592(b) of the Commission's Rules	File No. BPCTI-13
WESTERN TELEVISION CO., LEAD, S. DAK. For Conditional Grant Pursuant to Section 1.592(b) of the Commission's Rules	File No. BPCTI-14

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 15, 1974)

BY THE COMMISSION

1. We have before us for consideration the applications (BPCTI-13 and BPCTI-14) filed by Western Television Company (Western) for construction permits for interim authority to operate on channel 7, Rapid City, and channel 5, Lead, South Dakota.

2. We believe that a brief summary of our prior actions with respect to the operation of channel 7, Rapid City, and channel 5, Lead, South Dakota, would be of value to an understanding of the present proceeding. On November 1, 1971, the Commission released its decision, 32 FCC 2d 196, in which it denied the applications of Eli and Harry Daniels, d/b as The Heart of the Black Hills Stations (Black Hills), for renewal of the licenses of stations KRSD-TV, Rapid City, and KDSJ-TV, Lead, South Dakota. On July 26, 1972, the Commission denied reconsideration, 36 FCC 2d 568, and on February 26, 1973, the Commission's decision was affirmed *per curiam* by the United States Court of Appeals for the District of Columbia, *The Heart of the Black Hills Station* v. *Federal Communications Commission*, Case No. 72, 1804, D.C. Circuit. Subsequently, on May 21, 1973, the Court denied Black Hills' petition for rehearing.[1] Thereafter, in a Public Notice, 41 FCC 2d 281, released June 1, 1973, the Commission stated that it would accept applications for construction permits for new television broadcast stations to operate on either or both channels, and that it would consider requests for joint interim operating authority, pursuant to section 1.592(b) of the rules,[2] for either or both channels. The

[1] The Supreme Court denied *certiorari* on November 5, 1973.

[2] Section 1.592(b) provides as follows: When two or more applications for the same television assignment have been designated for hearing, the Commission may, if the public interest will be served thereby, make a conditional grant to a group composed of any two or more of the competing applicants, such grant to terminate when the successful applicant commences operation under the terms of a regular authorization. No conditional grant will be made unless all of the competing applicants have been afforded a reasonable opportunity to participate in the group seeking the conditional grant. In its application, the group shall include a special showing as to the need for the service pending operation by the successful applicant under the terms of a regular authorization; the effect, if any, of a grant on the position of any applicant which is not a member of the group; and any other factors which are deemed pertinent to the public interest judgment.

Public Notice also established a "cut-off" date of July 16, 1973, by which substantially complete applications for permanent and interim operating authority had to be tendered for filing in order to receive comparative consideration. In addition, the Public Notice indicated that the Commission had accepted for filing the applications (BPCT–4627 and BPCT–4628) of Dakota for construction permits for new television broadcast stations to operate on channel 7, Rapid City, and channel 5, Lead, South Dakota. Subsequently, in an Order, 41 FCC 2d 170, released June 5, 1973, the Commission granted a motion for stay, filed May 14, 1973, by Black Hills of the effective date of the Commission's July 26, 1972, decision which had denied Black Hills' petition for reconsideration.[3] The Order also granted Black Hills temporary authority to continue the operation of stations KRSD–TV and KDSJ–TV until further order of the Commission. Black Hills was granted temporary authority to operate both stations in order to provide continuity of service to the public while the Commission considered requests for interim operating authority.

3. Thereafter, on July 16, 1973, Western filed applications (BPCT–4640 and 4641) for construction permits for new television broadcast stations to operate on channel 7, Rapid City, and channel 5, Lead, South Dakota, and a request for waiver of section 73.636 of the Commission's rules. On the same date, Western also filed the above-captioned applications (BPCTI–13 and 14) for construction permits for interim authority to operate on both channels. Western had requested a waiver of section 73.636 (multiple ownership) of the rules for the limited purpose of having its two applications for permanent authority processed. The waiver request arose from the fact that Leslie J. Kleven, 36-percent stockholder, president, and director of Western, is also a 72.9-percent stockholder, president, director, and general manager of Sturgis Radio Co., Inc., licensee of stations KBHB AM and FM, Sturgis, South Dakota. Since Sturgis is located within the predicted Grade A contours of Western's proposed Rapid City and Lead VHF stations, grant of its applications would be precluded under the "one-to-a-market" provisions of section 73.636(a)(1) of the rules. Dakota, applicant for permanent authority to operate on channel 7, Rapid City, and channel 5, Lead, opposed Western's waiver request and its applications for interim operating authority on the grounds that the applications were not substantially complete when filed. In a Memorandum Opinion and Order, 43 FCC 2d 625, released October 31, 1973, the Commission waived section 73.636 of the rules for the limited purpose of processing Western's applications for permanent operating authority. In addition, we found that Western had submitted substantially complete applications for interim operating authority. Finally, in an Order, adopted June 26, 1974, the Chief of the Broadcast Bureau, acting pursuant to delegated authority, designated for comparative hearing the mutually exclusive applications of Western and Dakota for construction permits for permanent authority to operate on channel 7, Rapid City, and channel 5, Lead, South Dakota.

[3] The July 26, 1972, decision provided, in part, that if Black Hills sought judicial review of the decision, it was authorized to continue to operate both stations until thirty (30) days after the final disposition of its appeal.

4. We turn now to a consideration of Western's proposals for interim authority to operate on channel 7, Rapid City, and channel 5, Lead. Although Western and Dakota have not reached a formal agreement, after extensive negotiations between the parties, they appear to be in substantial agreement on the following details relating to interim operations for Rapid City and Lead. With respect to the facilities to be utilized, the stations will operate from the transmitter and studio locations specified in Dakota's applications for permanent operating authority. In addition, the interim operations will use the transmitters and other related equipment specified in Western's applications for permanent operating authority. Western and Dakota will each provide one-half of the funds required for the cost of construction and first-year operation of the interim facilities. Moreover, neither party will be required to guarantee the repayment of the other's financial obligations. Furthermore, it is contemplated that a joint interim corporation will be formed with Western and Dakota as equal stockholders, sharing profits and losses equally in the interim operations. The control and management of the corporation will be in the Board of Directors of such corporation and will be composed of two directors selected by Western, two directors selected by Dakota, and a fifth director selected by mutual agreement of Western and Dakota. The Board of Directors will select a station manager who will hire the staff, subject to the Board's approval.

5. There are, however, two areas in which Dakota and Western have been unable to reach an agreement. Specifically, Western's interim proposal provides that the interim corporation will be required to sell all of its assets to the successful applicant for permanent operating authority, and that the successful applicant will be required to purchase the interim facilities on a mutually agreed-upon basis. While Western has indicated its willingness to do so, Dakota has not yet committed itself to such a course of action. We believe that under the circumstances of this case, it would be appropriate to require that the winning applicant for permanent authority must purchase the interim facilities. We believe that the imposition of such a requirement would not be inimical to the public interest, and we have been advised by Western that the absence of such a requirement would make it more difficult, if not impossible, to secure the funds necessary for construction of the interim facilities. Moreover, we note that the proposed interim facilities are comparable in all respects to the facilities proposed in both Western's and Dakota's applications for permanent operating authority, and that, therefore, the viewing public in the area will continue to receive adequate service if the proposed interim facilities are continued in use by the winning applicant.

6. The other matter on which the applicants have been at odds relates to the Commission's "one-to-a-market" rule, as set forth in section 73.636 of the rules, and its applicability to the proposed interim operations. Although this question arose initially in connection with Western's applications, a recent amendment to Dakota's applications has brought them also within the purview of the "one-to-a-market" provisions of the Commission's rules. With respect to Western's applications, Leslie J. Kleven, 35.50-percent stockholder, president, and a director of Western, is also a 72.9-percent stockholder, president, a

director, and general manager of Sturgis Radio Co., Inc., licensee of stations KBHB AM and FM, Sturgis, South Dakota. In addition, three other principals of Western, Robert W. Davis, 6.39-percent stockholder and a director, Raymond H. Ricci, 6.39-percent stockholder, and Dana E. Caldwell, 10.62-percent stockholder, are employees of stations KBHB AM and FM, and Mr. Kleven's wife, Marguerite E. Kleven, is a 19.7-percent stockholder, secretary-treasurer, and a director of Sturgis Radio Co., Inc. Since Sturgis lies within the predicted Grade A contours of Western's proposed Rapid City and Lead VHF stations, grant of its applications for permanent operating authority would be precluded under the "one-to-a-market" provisions of section 73.636(a)(1) of the rules. Dakota's applications for permanent operating authority are also subject to the "one-to-a-market" rule since Peter G. Sieler, 5-percent stockholder and a director of Dakota, is a 5-percent stockholder of Midland Broadcasting Company of South Dakota, licensee of standard broadcast station KTOQ, Rapid City. Western has stated that if its applications for permanent authority were granted, Mr. Kleven would dispose of his interests in the AM and FM stations in Sturgis, and that Messrs. Ricci, Caldwell, and Davis would resign as employees of the Sturgis stations and assume fulltime staff positions with Western's Rapid City and Lead television stations. In addition, Western has indicated that Marguerite E. Kleven would also divest herself of her interests in stations KBHB AM and FM. Similarly, Dakota has stated that, in the event of a grant of its applications for permanent authority, Mr. Sieler would dispose of his interest in station KTOQ. Consequently, in our Order, *supra*, designating for comparative hearing the applications of Western and Dakota for permanent operating authority, we provided that in the event of a grant of either Western's applications or Dakota's applications, the grant would be made subject to an appropriate divestiture condition.

7. With respect to the proposed interim operations, we believe that the "one-to-a-market" rule should not be imposed to bar the participation of Western's and Dakota's principals in those activities associated with the construction of the interim facilities. We believe that the broadcast experience of the applicants' principals will be of considerable value to the interim corporation in its efforts to construct the interim facilities expeditiously, and that the public will benefit from the early activation of those facilities. Therefore, we shall waive the "one-to-a-market" rule in order to permit the participation of all the principals in the various activities relating to the construction of the stations, the submission of the license applications, and the filing of requests for operating authority. However, we can find no public interest benefits, nor have the applicants advanced any such considerations, which would warrant a continuation of the waiver at the time that we issue operating authority for the interim stations. Thus, we shall provide that within twenty (20) days of the release date of this Order, Western shall be required to file with the Commission a proposal concerning the steps that will be taken by Marguerite E. Kleven, Leslie J. Kleven, Robert W. Davis, Raymond H. Ricci, and Dana E. Caldwell to effectively separate themselves from the control,

management, and operation of either stations KBHB AM and FM or the interim stations. Similarly, Dakota shall be required to submit a proposal, within the same time period, for the effective separation of Peter G. Sieler from the control, management, and operation of either station KTOQ or the interim stations. Moreover, we shall provide that no operating authority for the interim stations will be issued until the above-named principals of Western and Dakota have effectively separated themselves from stations KBHB AM and FM and KTOQ, respectively, or from the proposed interim operations.

8. We find that the operation of channel 7 in Rapid City and channel 5 in Lead, South Dakota, pending the outcome of the comparative hearing for permanent operating authority, as proposed by Western, and modified by us, would serve the public interest, in that it would provide the viewing public in the area with vastly improved service over that now being provided by the former licensees of KRSD–TV and KDSJ–TV under our temporary authorization of June 5, 1973. Furthermore, we find that a grant of Western's proposals, as modified above, for interim operations would likewise serve the public interest, because Dakota will have the opportunity to participate in the interim operations on a fair and equal basis, and because no comparative or other advantage will accrue to either Western or Dakota by reason of participation in the interim operations. In this connection, we will require that Dakota advise the Commission within thirty (30) days of the release date of this Order as to whether it intends to join the proposed interim operations.

9. Accordingly, IT IS ORDERED, That section 73.636(a)(1) of the rules IS HEREBY WAIVED to the extent indicated in paragraph 7, above; that the applications (BPCTI–13 and 14) of Western Television Company ARE HEREBY GRANTED, on the bases set forth above, in accordance with specifications to be issued and subject to the following conditions: (a) within twenty (20) days of the release date of this Order, Western Television Company shall submit a proposal which is designed to effectively separate Marguerite E. Kleven, Leslie J. Kleven, Robert W. Davis, Raymond H. Ricci, and Dana E. Caldwell from the operation, control, and management of stations KBHB AM and FM, Sturgis, South Dakota, or the proposed interim operations; (b) within twenty (20) days of the release date of this Order, Dakota Broadcasting Co., Inc., shall submit a proposal which is designed to effectively separate Peter G. Sieler from the control, management, and operation of standard broadcast station KTOQ, Rapid City, South Dakota, or the proposed interim operations; (c) no operating authority shall be issued to the interim corporation to operate on channel 7, Rapid City, and channel 5, Lead, until the principals of Western Television Company and Dakota Broadcasting Co., Inc., have effectively separated themselves from the control, management, and operation of stations KBHB AM and FM and KTOQ, respectively, or from the proposed interim operations.

10. IT IS FURTHER ORDERED, That Dakota Broadcasting Co., Inc., shall have thirty (30) days after the release date of this Order within which to indicate whether or not it intends to participate in the interim operations under the terms of this authorization.

11. IT IS FURTHER ORDERED, That this authorization shall terminate upon grant of program test authority to the winning applicant in the comparative hearing for permanent operation, or upon final denial of all applications in that proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT F. MULLINS, *Secretary.*

47 F.C.C. 2d

FCC 74-744

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re WESTON TELEVISION CABLE CORP., WESTON, W. VA. Request for Special Relief	CSR-450 (WV208)

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1974; Released July 24, 1974)

BY THE COMMISSION:

1. On July 23, 1973, Weston Television Cable Corporation, operator of a cable television system at Weston, West Virginia, filed a request for special relief (CSR-450) seeking waiver of Sections 76.55(a)(2), 76.55(a)(3), 76.91(a), and 76.93(a) of the Commission Rules.[1] The petition was filed in response to a carriage and network program exclusivity request made by Withers Broadcasting Company of West Virginia, licensee of Television Broadcast Station WDTV, Weston, West Virginia.[2] Withers has filed opposition to the requested waiver.

2. Weston, West Virginia is a designated community of the Clarksburg-Weston, West Virginia, smaller television market. The subject cable system now serves over 2,800 subscribers with the following television broadcast signals:

WDTV (CBS, Channel 5) Weston, West Virginia
WBOY-TV (NBC, Channel 12) Clarksburg, West Virginia
WCHS-TV (CBS, Channel 8), Charleston, West Virginia

[1] These sections of the Commission's Rules provide as follows:

Section 76.55 (a) Where a television broadcast signal is required to be carried by a cable television system, pursuant to the rules in this subpart: * * *

(2) The signal shall, on request of the station licensee or permittee, be carried on the system on the channel number on which the station is transmitting, except where technically infeasible;

(3) The signal shall, on request of the station licensee or permittee, be carried on the system on no more than one channel.

Section 76.91 (a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in 76.93 and 76.95.

Section 76.93 (a) Where the network programming of a television station is entitled to program exclusivity, the cable television system shall, on request of the station licensee or permittee, refrain from simultaneously duplicating any network program broadcast by such station, if the cable operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. On request of the cable system, such notice shall be given no later than the Monday preceding the calendar week (Sunday-Saturday) during which exclusivity is sought.

[2] Withers seeks "single-channel" carriage (see Section 76.55(a)(3), *supra*) and "on-channel" carriage, except where technically infeasible (see Section 76.55(a)(2), *supra*), in addition to its general request for non-degraded carriage pursuant to Section 76.55 (a)(1) of the Rules. Weston Television states that WDTV's signal is carried in compliance with the provisions of Section 76.55(a)(1) and therefore, does not request waiver of that section of the Rules.

WSAZ–TV (NBC, Channel 3) Huntington, West Virginia
WOAY–TV (ABC, Channel 4) Oak Hill, West Virginia
WWVU (Educ., Channel 24) Morgantown, West Virginia
WTRF–TV (NBC, Channel 7) Wheeling, West Virginia
WSTV–TV (CBS/ABC, Channel 9) Steubenville, Ohio
KDKA–TV (CBS, Channel 2) Pittsburgh, Pennsylvania
WTAE–TV (ABC, Channel 4) Pittsburgh, Pennsylvania

Weston, WDTV's city of license, is located within the CBS affiliate's predicted principal community contour. Stations WCHS–TV, Charleston, West Virginia, WSTV–TV, Steubenville, Ohio, and KDKA–TV, Pittsburgh, Pennsylvania, also carried on the system and each broadcasting CBS network programming, do not place even a predicted Grade B contour over the cable community.

3. Weston Television supports its request for waiver of the program exclusivity rules by arguing that: (a) there is no demonstrable need for exclusivity, for WDTV has broadcast since 1960 without resorting to exclusivity protection, which indicates its continuing financial viability; (b) affording program exclusivity protection to WDTV would result in serious inconvenience and higher cost for the system's subscribers; (c) the costs and problems of providing exclusivity protection to WDTV would more than offset any theoretical benefit to the station; and (d) the system's headend is remotely located and not easily accessible—a fact which allegedly prevents prompt reprogramming of switching equipment should a change be necessary. Furthermore, Weston Television asserts that affording Withers "single-channel" carriage, in combination with exclusivity protection, would leave three cable channels (normally carrying CBS programming from other stations) blank for many hours each day. According to Weston Television, this "blacking-out" would greatly inconvenience and aggravate subscribers and appear to be a diminution of service. The system's operator further maintains, in support of its waiver request, that certain larger systems in the area, which already afford program exclusivity to WDTV, carry the station on more than one cable channel during periods of its protection.

4. The rules do not require that a request for network program exclusivity be made at any particular time, and Weston Television has failed to substantiate its allegations that it or Weston subscribers will be injured by this delayed invocation of exclusivity protection or that WDTV does not need such protection. Accordingly, we reject the system's argument. *Massillon Cable TV, Inc.*, 21 FCC 2d 188 (1970); *Imperial Broadcasting Co., Inc.*, 19 FCC 2d 791 (1968). Similarly, the system operator has submitted no documentation for its claim that its headend is so inaccessible as to preclude diligent adherence to the Commission's program exclusivity rules. Finally, Weston Television has failed to demonstrate that single channel carriage of a higher priority station in that station's city of license will be injurious to either the system or the public interest.

5. As noted above, Withers has requested (in accordance with the provisions of Section 76.55(a)(2) of the Commission's Rules) "on-channel" carriage ". . . except where technically infeasible." While Weston Television has filed for waiver of Section 76.55(a)(2), it has

not formally addressed this issue and Withers has not pursued the matter in its pleadings. Weston Television's 1972 FCC Form 325 discloses that Station WDTV (broadcast channel 5) is carried on cable channel 6. We have been presented no data relevant to the feasibility of WDTV's carriage on cable channel 5. More precisely, Weston Television has made no showing that such "on-channel" carriage is infeasible. Therefore, we shall deny Weston Television's request for waiver of Section 76.55(a)(2).

In view of the foregoing, the Commission finds that grant of the requested waiver would not be consistent with the public interest.

Accordingly, IT IS ORDERED, that the request for waiver (CSR–450) filed by Weston Television Cable Corporation, IS DENIED.

IT IS FURTHER ORDERED, that Weston Television Cable Corporation, IS DIRECTED to comply with the requirements of Sections 76.55(a)(2), 76.55(a)(3), 76.91(a), and 76.93(a) of the Commission's Rules on its cable television system at Weston, West Virginia, within thirty (30) days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–761

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WFBM, INC. For Renewal of Licenses for Stations WNDE and WFBQ–FM, Indianapolis, Ind.	File Nos. BR–493, BRH–1049

MEMORANDUM OPINION AND ORDER

(Adopted July 10, 1974; Released July 19, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has before it for consideration: (i) the license renewal applications of WFBM, Inc. for Stations WNDE and WFBQ–FM, Indianapolis, Indiana; (ii) an "Objections to renewal of AM–FM licenses and petition for public hearing," filed May 31, 1973, by the Indianapolis Local, American Federation of Television and Radio Artists (AFL–CIO); and (iii) an opposition to the aforenoted pleading.

2. The provisions for filing a formal protest to the grant of an application for renewal of a broadcast license are governed by Section 309(d) of the Communications Act of 1934, as amended, and by Section 1.580(i) of the Commission's implementing rules. In pertinent part, Section 309(d) requires that a petition to deny a broadcast license renewal application set forth specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the challenged application would be *prima facie* inconsistent with the public interest, convenience and necessity. Such allegations of fact, except for those of which official notice may be taken, must also be supported by affidavit of a person or persons with personal knowledge thereof. Hearsay, rumor, opinion or broad generalization do not satisfy the specificity requirements of Section 309(d) or the Commission's regulations implementing that provision of the Communications Act.

3. The instant petition will be dismissed because of its pervasive lack of specificity and the documentation necessary to support its allegations. No affidavits in support of the allegations set forth in the petition have been supplied. Moreover, the factual predicates for petitioner's accusations that the licensee has attempted "to take away benefits long enjoyed by employees of said broadcasting stations prior to [its] ownership" and "to adopt labor practices which adversely affect the economic conditions of all people employed in broadcasting in and about Indianapolis" are nowhere set forth. Nor has petitioner explained the basis for its charge that the licensee fraudulently induced the dismissal of the objections which it had earlier filed against

WFBM, Inc.'s acquisition of Stations WNDE and WFBQ–FM from Time-Life Broadcast, Inc. According to petitioner, the licensee has engaged in racist employment practices and has presented an over-abundance of commercials in certain unspecified time periods. Again, however, petitioner has relied upon general, conclusory assertions instead of setting forth specific factual allegations which would warrant grant of the relief requested. It is well established that allegations of ultimate conclusory facts or mere general allegations are not sufficient to require an evidentiary hearing. *Chuck Stone* v. *F.C.C.*, 466 F.2d 316, *rehearing denied* 466 F.2d 331 (1972).

4. In sum, the Commission concludes that the instant petition must de dismissed for failure to set forth specific facts which, if true, would establish that a grant of the WNDE and WFBQ–FM renewal applications would be *prima facie* inconsistent with the public interest. Even if the Commission were to treat the instant petition as an informal objection filed pursuant to Rule 1.587, the absence of specific factual allegations regarding the accusations advanced by the protestant would mandate a similar denial of the relief requested.

5. Therefore, IT IS ORDERED, That the "Objections to renewal of AM–FM licenses and petition for public hearing," filed May 31, 1973, by the Indianapolis Local, American Federation of Television and Radio Artists (AFL–CIO), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-701

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
WITR RADIO, ROCHESTER, N.Y.
For Waiver To Permit Use of Non-Type-Accepted Radio Equipment

JUNE 25, 1974.

WITR RADIO,
Box 9969,
Rochester, N.Y.
(Attention of Mr. Michael J. Lambert)

GENTLEMEN: This is to inform you that the Commission has denied your request of April 26, 1973, for waiver of its rules to permit the use of non-type-accepted (Citizens Radio Service) radio equipment in the Business Radio Service.

Your request was denied because the Commission felt that you failed to support your waiver request with any compelling reason why you could not use type accepted equipment.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-728

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WKQW RADIO, INC., LICENSEE OF RADIO STATION WKQW, SPRING VALLEY, N.Y.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1974; Released July 24, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated October 11, 1973 (mailed October 15, 1973) issued to WKQW Radio, Inc., the licensee of Radio Station WKQW, Spring Valley, New York and (2) the licensee's response thereto dated November 16, 1973.

2. The Notice of Apparent Liability for forfeiture in the amount of one thousand dollars ($1,000) was issued for willful or repeated violation of Section 73.114(a)(1)(i) of the Commission's Rules in that the licensee failed to make weekly entries in the maintenance logs dated August 1, 1972 through November 1, 1972 showing the readings of the tower base current ammeters, the associated remote meters, and indications of calibration of the remote meters against the tower base current ammeters and was further issued for willful or repeated failure to abide by the terms and provisions of the station license by failing to make field intensity measurements at each of the monitoring points at least once every seven days between October 7, 1972 and November 2, 1972 and keep a record thereof.[1]

3. The licensee responded to the Notice of Apparent Liability stating, in substance, that financial ills, with attending conditions, contributed to the violations. In particular reference to the failure to make field intensity measurements the licensee states that by reason of his collateral duties the Chief Engineer, who had the responsibility of ensuring proper log maintenance, was required to assign to a part-time technician the duties of making and recording the measurements. Further in this connection, the licensee states that the field intensities were "assertedly" made by the part-time technician to whom the duty was assigned, but that he failed to keep a record of the measurements. The licensee attributes the failure to make the log entries required by Section 73.114(a)(1)(i) of the Commission's Rules to a misunderstanding between two announcer-engineers who believed the

[1] The station license for WKQW provides that ". . . the field intensity at each of the monitoring points being measured at least once every seven days and an appropriate record kept of all measurements so made."

other to be responsible for the making of these entries. The licensee also states that throughout the period of the violations no other station suffered interference from licensee's operation and that there was no indication that the operation was other than in compliance with the parameters of its license. The licensee states that in the past it has emphasized programming service to the public and requests that the forfeiture "be eliminated or reduced to a figure consistent with its ability to pay."

4. We find that the licensee repeatedly violated Section 73.114(a)(1)(i) of the Commission's Rules during the period October 16 through November 1, 1972, and that the licensee repeatedly failed to abide by the terms and provisions of its station license during the period from October 16 to November 2, 1972. The licensee's assertions that there was no interference with other stations and that the operation was within licensed parameters do not serve to relieve the licensee of the responsibility of making field intensity measurements and keeping a record thereof. *Auburn Broadcasters, Inc.*, 41 FCC 2d 462 (1973). We have consistently held that licensees are responsible for the acts or omissions of their employees. *Eleven Ten Broadcasting Corp.*, 32 FCC 706 (1962); *Continental Broadcasting, Inc.*, 15 FCC 2d 120 (1968); *The McLendon Corporation*, 18 FCC 2d 224, 228 (1969). Licensees are expected to comply with the technical rules of operation as well as to make continued efforts to serve the community to which they are licensed and will not be relieved of liability for violation of the Rules by the fact that they have fulfilled their responsibility to serve their communities. *Esther Blodgett*, 18 FCC 2d 6 (1969); *Folkways Broadcasting Co.*, 12 FCC 2d 887 (1968). Having considered the licensee's response and all of the circumstances of this case, including the licensee's financial condition, we are not persuaded to set aside the forfeiture or mitigate the amount thereof.

5. In view of the foregoing, IT IS ORDERED, That WKQW Radio, Inc., the licensee of Radio Station WKQW, SpringValley, New York, FORFEIT to the United States the sum of one thousand dollars ($1,000) for the repeated violation of Section 73.114(a)(1)(i) of the Commission's Rules and repeated failure to abide by the terms and provisions of the station license. Payment of the forfeiture may be made by mailing to the Commission a check, or similar instrument, drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Rules of the Commission, an application for remission or mitigation of the forfeiture may be filed within thirty days from the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-681

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint Concerning
WKYX, INC., BRISTOL, VA.
For Alleged Hypoing

JUNE 26, 1974.

WKYX, INC.,
RADIO STATIONS WKYX AND WKYQ(FM),
Post Office Box 799,
Bristol, Va.

GENTLEMEN: This is in reference to Commission inquiries of September 6 and November 7, 1973, and your responses of September 26 and December 18, 1973 and January 30, 1974. The Commission's inquiries were prompted by complaints of hypoing. It was alleged that you arranged a Secret Sound contest (with an automobile as the principal prize) to coincide with an ARB Overnight Radio Survey which you had ordered, and that the hypoed survey results were thereafter widely disseminated.

In response to our first inquiry you stated that the contest was one of a large number of promotions presented since you took over operation of the station in late November 1971. You stated that following a format change in late May 1972:

> . . . the Licensee launched an intensive campaign of audience promotional activity with the intent that this was to be our regular practice henceforth. From July 1972 to the present, there has not been a single week-day that some kind of audience-participation promotion or contest has not been aired. Some *thirty* audience-building promotions and contests were aired from May 27, 1972, to the present. The total amount of cash and prizes at retail value given away during this period totaled approximately *$13,000.00*.

You listed thirty-six contests and promotions scheduled or presented from May 1, 1972 through November 30, 1973. Appended to your letter were descriptions of these contests and promotions, with dates of broadcast, sample texts of promotional announcements and lists of prizes and winners. You stated that, "We believe that this history of regular promotion demonstrates that the station employs promotions and contests as an integral part of its normal activity, and that no unusual practices were being employed during a rating period which would constitute 'hypoing'."

With regard to the Secret Sound contest, you stated:

> . . . this contest was a part of our regular promotion practice, and was in no way planned as a means of influencing any audience survey. The contest was commenced in May 1973, with the winner to be selected by his or her identifying a simple "secret sound" aired hourly over the station. We had no way of knowing when the contest would be over and the prize be awarded. Indeed, chances were that the contest would be completed in June, well before the ARB overnight survey on July 17. As it turned out, it ran longer than expected—a little over two months in all. The winner was finally found on July 27, ten days after the ARB survey. The complainant who states that the car was

awarded during the week of July 16 is irresponsibly incorrect with his facts.

Note also that the value of the car given away was only about $2,300 or approximately one-sixth of our total yearly giveaway of $13,000. We believe that the amount of the giveaway is quite in line with comparable giveaways during comparable periods since the contest did in fact run about one-sixth of the year. Though it is true that the single item's value exceeds most other single giveaway values, the Commission should not be misled into thinking that a big item giveaway is more effective than a multiple item giveaway of the same cash value. Audiences are quite sophisticated as to their odds for winning, and the multiple giveaways are generally more productive of audience. But whether or not the Commission agrees with this, the fact is that when the contest started, we had no idea that it would be in process during a rating period. In short then, we do not believe that anything about this matter indicates that there was an effort to, or in fact that there was hypoing of our station during a rating period.

You further stated:

In conclusion then, we wish to assure the Commission that it is not the policy of the station to utilize contests or promotions to influence audience surveys in any manner which the Commission or the Federal Trade Commission would consider hypoing. As we indicated at the commencement of this letter, when the present licensee took over WKYX in November 1971, the station was flat on its back in a number of regards—technical as well as programming and audience following. We made a number of changes including improvement of the technical facility, improvement of the public affairs and news programming of the station, plus more active participation in the Community than had hitherto been the case. In addition we changed format and dramatically increased the level of activity in the operation generally. This included a very active program of contests and promotions, and involvement with the people of the Community. This effort found great success, and the result was that the station started for the first time in recent years to become a viable operation.

There can be little doubt that this success has shocked and irritated other stations in the market which until now have done little or no promotion, and in the past have been able to loaf along and still maintain large shares of audience. We believe that this has created some animosity, and in all likelihood has engendered the complaint which the Commission has reference to. It is our belief that we have done nothing wrong and that an active station should not be penalized for being active. Indeed, we read the Commission's memo on hypoing, and the NAB's instructions on this point to permit a station to be active with contests and promotions so long as it is not unfairly done to distort any particular survey or deceive its audience. We have assiduously attempted to avoid any such distortion, and will continue to do so, but hopefully we can remain an active operation serving the public needs of Paducah and our service area.

You also stated that you arranged on June 20, 1973 to have the one-day ARB telephone survey conducted on July 17, 1973 (8 a.m. to 8 p.m.) after you were unable to arrange a survey jointly underwritten by all the Paducah stations, and after you determined that a more extensive survey would be too costly.

Of the 36 contests and promotions you listed in your letter as presented from May 1, 1972 through November 30, 1973, 21 were contests. Those with the greatest value prizes were the following:

(1) Car Call. Conducted during August and September 1972, this contest awarded $4,000 in cash and prizes to nearly 200 motorists; each won ". . . a major gift valued from $10 to $100 along with smaller prizes such as theatre passes, Pepsi certificates, sun tan lotion, etc."

(2) Secret Sound. Described more fully below, this contest gave a single winner an automobile and other prizes with a total value of $2,300.

(3) Car Wash Rip-Off. Aired from January through March 1973, this contest awarded $2,028 in car wash coupons (each winner received coupons worth $39).

(4) Movie Flick Rip-Off. In this seven-month promotion with $1,000 of theater passes as prizes, each winner won two passes.

(5) Pizza Giveaway. A continuing contest begun in December 1972, this contest awarded two pizzas each week-day. Though the total value of prizes exceeded $800, each pizza was worth but a few dollars.

The information you supplied indicated that promotion of the Secret Sound contest began on May 14, 1973; that you began accepting hourly telephone guesses of the identity of the Secret Sound on May 29, with a prize of 50 gallons of gasoline; that you added a set of tires and 52 car washes on June 13; and that you added a Gremlin automobile to the prize package on June 22. You stated that you ceased taking guesses on Thursday, July 12, and made the following announcement hourly that day:

SINCE WKYX STARTED OUR SECRET SOUND CONTEST, WE HAVE HAD MANY GUESSES, ALL INCORRECT SO FAR . . . WE HAVE TRIED MAKING THE PRIZE MORE WORTHWHILE FOR IDENTIFYING SUCH A DIFFICULT SOUND, BUT STILL NO LUCK . . . LADIES AND GENTLEMEN . . . WKYX IS NOW AT OUR WITS-END . . . WE SIMPLY DON'T KNOW WHAT TO DO . . . WHILE WE DECIDE WHAT OUR NEXT STEP SHOULD BE, WE WILL STOP THE CONTEST . . . NO MORE GUESSES WILL BE ACCEPTED UNTIL FURTHER NOTICE . . . PLEASE STAND BY FOR A MAJOR ANNOUNCEMENT SOON ON WKYX . . .

You indicated that the next day (Friday, July 13) you made the following announcement hourly:

LADIES AND GENTLEMEN, AFTER MUCH CONSIDERATION . . . WKYX HAS DECIDED THAT CLUES ARE THE ANSWER TO OUR DILEMMA . . . IN THE SECRET SOUND CONTEST . . . WKYX WILL CONTINUE TO OFFER THE SAME PRIZE PACKAGE FOR THE ONE WHO CORRECTLY IDENTIFIES OUR SECRET SOUND . . . BUT IN ORDER TO HELP YOU GUESS THAT SOUND, WE WILL ANNOUNCE CLUES DAILY ON WKYX . . . STAND BY FOR CLUE NUMBER ONE MONDAY . . .

The first clue was apparently given on Monday, July 16; you resumed accepting hourly guesses the same day. On Tuesday, July 17—the date of the survey—you altered the contest pattern by accepting continuous guesses during a regularly scheduled telephone call-in program, from 6:15 to 6:30 p.m. The prize package was awarded several days later, on July 27, 1973, when continuous guesses were accepted for a second time.

As you are aware, the Commission adopted a Public Notice on October 27, 1965 informing licensees that in determining whether they were operating in the public interest, the Commission would evaluate a licensee's compliance with the guidelines set forth in the FTC statement of July 8, 1965. One of the guidelines concerns hypoing and states in part:

A person (or firm) making a claim concerning the size, composition or other important characteristic of a listening or viewing audience is responsible for seeing to it that the claim is truthful and not deceptive. If he bases his claim on the results of an audience survey, he assumes responsibility for interpreting the data accurately. Thus, he should not engage in activities calculated to distort or inflate such data—for example, by conducting a special contest, or otherwise varying his usual programming, or instituting unusual advertisting or other promotional efforts, designed to increase audiences only during the survey period.

In determining compliance with the FTC guidelines, we consider not only the number but the types of contests and promotions. Against a background of many contests with relatively small prizes, the largest with a retail value of approximately $100, a contest with a single prize worth over $2,300 was not mere continuation of a long-standing practice. Nor was your action in interrupting the normal contest procedures the week-end before the survey, then commencing daily clues the day before the survey, part of your routine programming. Both your

presentation of such a major contest at the time of the one-day ARB survey, and your conduct of the contest immediately prior to and during the survey, constituted hypoing, since you knew or should have known that their likely result would be a temporary increase in the size of the stations' audience on the survey date.

The complaints received by the Commission also included allegations that you used results of the July 17, 1973 ARB survey improperly. An advertisement you admitted placing in the August 15, 1973 Paducah *Sun-Democrat* stated in part as follows:

AMERICAN RESEARCH BUREAU AMERICA'S MOST RESPECTED RADIO RATINGS FIRM Proclaims WKYX Number One Among Adults and/or Young People in Paducah.

American Research Bureau Reports WKYX Has More Listeners Than All Other Stations Combined

* * * * * * *

WKYX—57 Sincerely Thanks You.

(ARB Survey is open to public inspection, including from other radio stations.)

You also admitted disseminating to many local businesses an invitation which stated as follows:

The American Research Bureau, The Nation's most Respected Radio Ratings Service, proclaims WKYX The Number One Radio Station in this area. In celebration of this honor, WKYX–57 invites You and a Guest to a "Number One" party at The Ritz Hotel, Friday, August twenty-fourth, nineteen hundred seventy-three, from eight o'clock P.M. to eleven o'clock P.M. RSVP 554–1217.

FTC guidelines adopted by this Commission on October 27, 1965 include the following:

Audience data are based on sample surveys not derived from complete measurements of audiences. As such, they are statistical estimates, and, at best are of only limited reliability due to errors and distortions inherent in the statistical methods yielding such data. Claims as to audience coverage based on audience surveys should therefore be qualified in recognition of the fact that survey data are inherently imperfect. Any such claims should be accompanied by a disclosure that any figures cited or quoted are estimates only or are based upon estimates, and are not accurate to any precise mathematical degree unless based upon a true probability sample. Audience surveys are not in practice based upon true probability samples.

We believe that the nature of the survey required that you exercise special care and candor in disclosing the survey results to a public that included present and potential advertisers. Anything short of full disclosure that the figures represented a report based on only a one-day survey during which the stations presented a major contest might have given a false and misleading impression of the relative ranking of the Paducah stations, and was not a responsible use of audience research.

In short, your conduct of a giveaway contest featuring an unusually large prize at the same time a special one-day survey you had ordered was being taken, and your dissemination without qualification of results of that survey, were inconsistent with the obligations set forth in our Public Notice of October 27, 1965. Your actions in this regard have fallen considerably short of the degree of responsibility that we expect of a broadcast licensee. This matter has been made part of the permanent records of WKYX and WKYQ(FM) for consideration in connection with future applications for the stations.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-779

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WLUC, INC. For Renewal of License of Station WLUC-TV, Marquette, Mich.	File No. BRCT-301

MEMORANDUM OPINION AND ORDER

(Adopted July 16, 1974; Released July 26, 1974)

BY THE COMMISSION: COMMISSIONERS WASHBURN AND ROBINSON NOT PARTICIPATING.

1. The Commission has before it for consideration: (i) the above-captioned application for renewal of license for Station WLUC-TV, Marquette, Michigan; (ii) a timely-filed petition to deny that application and (iii) various other related pleadings.

2. Petitioner, William J. Malandrone, the Mayor of Marquette, contends that the main studios of Station WLUC-TV are located outside the corporate boundaries of the City of Marquette in violation of Section 73.613 of the Commission's Rules. According to Mr. Malandrone, WLUC-TV's studio location makes coverage of local events impossible, removes the station from involvement in the community, and deletes the station from Marquette's tax rolls. Petitioner further alleges that Station WLUC-TV does not provide the required minimum signal intensity over all of the City of Marquette [1] and that viewers of Channel 6 must either subscribe to local CATV service or purchase roof-top antenna and filtering devices in order to obtain adequate signal reception. In support of this contention, petitioner submits a May 21, 1973 letter from WLUC-TV's general manager who describes some reception difficulties experienced by the station's viewers.[2]

3. In opposition, the licensee contends that the petition to deny is both substantially and procedurally defective.[3] With respect to the

[1] Section 73.685(a) of the Commission's Rules requires a television broadcast station operating on Channel 6 to provide a minimum field intensity of 74 decibels above one microvolt per meter (dBu) over the entire principal community to be served.

[2] In his letter, Mr. Lou W. Chappell also explained the circumstances surrounding the loss of WLUC-TV's former transmitter site and the need to relocate the station's transmitter in an area proximate to other broadcast towers. Following commencement of broadcast operations from its new site, Mr. Chappell relates that the station received a number of complaints regarding Channel 6's signal; that public comments regarding WLUC-TV's signal reception were solicited through newspaper and broadcast announcements; and that in approximately 250 homes the station provided filters to eliminate the interference which was being caused by the location of a nearby FM station. According to the WLUC-TV general manager, the station's engineering personnel conducted tests in the City of Marquette and "generally found the signal strength to be good if the television receiver being used is operating efficiently and an outside antenna is used."

[3] As noted by the licensee, the petition is not doubled spaced as required by Rule 1.49; nor is it signed and verified in the manner called for by Rule 1.52. Since the instant pleading, excluding exhibits, is only two pages in length and since it is supported by an affidavit of the petitioner, the procedural infirmities noted by the licensee are not so serious as to forestall Commission consideration of the petition to deny on its merits.

location of WLUC–TV's main studio beyond the geographic confines of the City of Marquette, the licensee submits that it is not in violation of the Commission's rules since operation of the Channel 6 studio at its present location was approved by the Commission in 1960 when the station was owned by North Central Broadcasting Company from which company the licensee subsequently purchased Station WLUC–TV. The licensee acknowledges that reception problems have been encountered following relocation of the WLUC–TV transmitter. However, these reception problems, argues the licensee, most likely stem from indiscriminate television receiver tuners, rather than from an inferior WLUC–TV signal. In addition, the licensee points out that no technical showing in support of the assertions concerning the signal strength of its station is set forth in the petition to deny.

4. In reply, petitioner renews his request that the WLUC–TV application be denied because of the station's violation of Rule 73.685. "A technically perfect TV set and an outside antenna," states Mr. Malandrone, "should not be required to receive the 'local' station." According to petitioner, the reception difficulties described in the petition are conclusive proof that the WLUC–TV signal is below Commission standards. In further support of his argument, petitioner submits the results of signal strength survey which he conducted at eight measuring points with a Jerrold 747 field strength meter and a seven-foot antenna.

5. The Commission's rules specify that the main studio of a television broadcast station shall be located within the corporate boundaries of the principal community to be served. However, where an adequate showing is made that good cause exists for locating the main studio outside the community of license and that to do so would be consistent with the operation of the station in the public interest, the Commission has permitted the main studio to be situated other than in the community of license. The required showing was made herein by North Central Broadcasting Company in October, 1959 when it received Commission approval to locate the WLUC–TV studio 6.5 miles west of the Marquette city limits adjacent to U.S. Highway 41. In early 1965, the Post Corporation acquired control of North Central's parent corporation and the WLUC–TV licensee was thereafter assigned, with Commission approval, to WLUC, Inc., a wholly-owned subsidiary of the Post Corporation and the present licensee of Station WLUC–TV. The transfer of control and subsequent assignment did not effect the terms of the WLUC–TV authorization, including the waiver of Rule 73.613 allowing the location of the station's main studio outside of Marquette. Petitioner's allegations therefore do not raise a serious question regarding the licensee's compliance with Rule 73.613.[4]

[4] As we previously indicated our main studio rules are intended to make broadcast stations readily assessible to the public in the communities which they are primarily licensed to serve and to ensure that stations realistically meet their obligation to serve their communities of license as outlets for local self-expression. See *Report and Order* in Docket 19028 regarding the main studio location of FM and television broadcast stations 27 FCC 2d 851, 21 RR 2d 1501 (1971). Here, there is no showing that the WLUC–TV studio is inaccessible, and the WLUC–TV renewal application reflects that during the composite week nearly 55 percent of the station's non-entertainment programming was local in nature, i.e., programs originated or produced by the station, or for the production of which the station is primarily responsible, employing live talent more than 50 percent of the time. In addition, Exhibits IV–13 and 14 of the WLUC–TV application further detail the station's role in promoting the activities and projects of local organizations and describe the community involvement of several WLUC–TV personnel.

6. To determine compliance with the Commission's rules concerning the minimum field intensity to be provided over the principal community to be served, television broadcast applicants are required to predict the coverage of their stations in the manner prescribed by Rule 73.684. The required showing was tendered by WLUC, Inc. in support of its application covering the relocation of the WLUC–TV transmitter and other modifications of the station's facilities. On the basis of the engineering information supplied, the Commission found the applicant to be technically qualified and granted that application on September 24, 1971. Petitioner urges the Commission to disregard these predictions; however, no error in the Commission's previous analysis is cited. Nor has petitioner proffered any reliable data indicating that the WLUC–TV signal is actually below our city-grade coverage standards.[5] See Rule 73.684(f). In the absence of acceptable empirical data to the contrary, we will not reject WLUC–TV's predicted coverage contours. Petitioner has therefore failed to set forth specific factual allegations, supported by an affidavit of a person with personal knowledge thereof, sufficient to show that WLUC–TV does not provide the City of Marquette with the city-grade signal required by Rule 73.685(a).

7. In view of the foregoing, the Commission concludes that petitioner has failed to raise a substantial and material question of fact requiring exploration in an evidentiary hearing. We also find, based upon our review of the license renewal application for Station WLUC–TV that the licensee is legally, technically, financially and otherwise qualified and that a grant of the WLUC–TV renewal application would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the petition to deny, filed September 4, 1973, by William J. Malandrone, IS DENIED.

9. IT IS FURTHER ORDERED, That the license renewal application of WLUC, Inc. for Station WLUC–TV, Marquette, Michigan, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[5] We also note that the use and reliability of field intensity measurements to establish signal strength and service contours of television broadcast stations is currently being explored in the rule making proceeding in Docket No. 18052. See *Notices of Proposed Rule Making*, FCC 68–235, 33 Fed. Reg. 4206, and FCC 71–422, 36 Fed. Reg. 7689, 8699. Accordingly, Commission action in this difficult and complex area should appropriately await resolution of that proceeding.

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